



**Submission to the Department of Justice and Constitutional Development
to reconsider Constitution 17th Amendment Bill, 2009**

17 July 2009

To: Minister of Justice and Constitutional Development
Mr Jeff Radebe
C/O Mr J J Labuschagne
Email: Jolabuschagne@justice.gov.za

Dear Mr. Labuschagne

RE: Submission on the Draft Constitution 17th Amendment Bill, 2009

1. Idasa is an independent public interest organisation committed to promoting sustainable democracy based on active citizenship, democratic institutions, and social justice. Idasa has been extensively involved in work aimed at strengthening South Africa's constitutional framework in accordance with the principles of the separation of powers framework established by the Constitution. Idasa is grateful for the opportunity to comment on the proposed constitutional amendment.
2. Idasa recommends that the draft Amendment Bill be reconsidered, for the reasons discussed below.
3. The Amendment Bill purports to address a specific issue relating to Electricity Distribution Industry (EDI) restructuring, namely, the "compulsory" transfer by municipalities of electricity distribution functions and assets to the envisaged regional electricity distributors (REDs). (Section (1A)(b)(i) of the draft Bill)

Responsibility without authority removes accountability

4. Section 156(1) of the Constitution grants local government executive authority and the “right” to administer *inter alia* matters related to electricity reticulation. The draft Bill appears to seek to remove this right and transfer it to the national sphere of government alone, as no reference is made in the draft Bill to existing concurrent responsibilities of the provincial sphere of government in Schedule 4 of the Constitution. (See especially paragraph 11 below regarding this interpretation)
5. While the draft Bill therefore appears to remove this right and this authority, it proposes, in section (1A)(c)(ii), to ensure that local authorities remain accountable to their community for the access to and delivery of electricity services – functions in respect of which they will no longer have authority.
6. The fundamental constitutional principle of accountability will, by this proposed Amendment, be so profoundly diluted that it will, for all practical purposes, be rendered nugatory. It is difficult to see how the proposed arrangement will withstand scrutiny by the constitutional court.

Autonomy of local government

7. In addition to the general constitutional provisions requiring co-operative government in Chapter 3 of the Constitution, section 154 of the Constitution requires that national and provincial governments “must support and strengthen the capacity of municipalities to manage **their own** affairs, to exercise their powers and to perform their functions”. (Emphasis added)
8. “Their own affairs” include, in terms of section 152(1) of the Constitution, the “provision of services (including electricity) to communities in a sustainable manner”. The argument in favour of regionalising, or pooling, resources to ensure the sustainable provision of electricity by better investment in reticulation infrastructure has been made elsewhere, and is referred to in subsection (1A)(a) and (b) of the draft Bill, and in paragraph 2. It may well be that sustainability could be achieved by such regionalisation, but it is unnecessary to pursue that debate in detail here.
- 9.1 Suffice it to say, however, that as a matter of policy, perhaps the underlying purpose of the legislation – the provision of sustainable electricity services – could be effectively achieved by less invasive legislation with a form of wording that entails a pooling of municipal authority in this functional area. So, for example, legislation could regulate the executive authority of municipalities to nevertheless require their mutual co-operation to this end, but primarily with each other. It could also set appropriate norms and standards.

- 9.2 Such an arrangement could ensure “appropriate planning and expenditure in respect of infrastructure and maintenance”, while not unduly and unnecessarily interfering in either the provincial or municipal spheres of government, or their autonomy.

Authority of local government

10. In any event, it is clear that the Constitution envisages that local government has an area of autonomous authority distinct from the national and provincial spheres. The draft Amendment Bill appears to propose extensive interference with the boundaries of those spheres.
11. Thus, section (1A)(b) and (c) provide for only “**appropriate municipal participation**” (emphasis added) in the new arrangements. No clarity is provided concerning what is viewed as ‘appropriate’, or what ‘participation’ might mean. It is, however, possible to read the provision to mean that executive authority over their rightful sphere of responsibility is thereby entirely removed from local governments, which are reduced to a consultative role, for example. Certainly, fears have been expressed that this is, indeed, the intention behind the draft legislation.
12. Additionally, the wording of the draft Bill is even broader in scope and contemplates purposes well beyond the immediate objective of electricity sector governance reform. Indeed, Paragraph 2.1 of the Memorandum on the Objects of the Bill declares that it “seeks to vest the national government with new powers of intervention at local government level **when it is necessary**”. Paragraph 2.2 goes further, stating that the ‘proposed new section 156(1A) (of the Constitution) is designed to facilitate ... **also** the regionalisation of **other** municipal functions’. (Emphasis added)
13. This intention is confirmed in section (1A)(a) as follows: “...national legislation may further regulate the executive authority of municipalities in respect of (all) local government matters listed in Part B of Schedule 4 and Part B of Schedule 5..”. These Schedules list all municipal functions.
14. The dramatic extent of these broad powers is clear from the provisions of subsection (1A)(b)(i) of the draft Bill, which proposes giving national government powers to regulate municipal executive authority in order to “facilitate appropriate institutional arrangements and municipal participation in those arrangements, including, **but not limited to**, compulsory participation and transfer of assets” (emphasis added).
15. These provisions open up the opportunity for national government to intervene significantly in local government matters not only in particular circumstances, but potentially whenever it deems it appropriate. The boundaries between the spheres of government will become both fluid and porous. The constitutional vision of “**distinctive**, interdependent and interrelated” spheres of government of section 40 of the Constitution (emphasis added) is thereby rendered fundamentally and essentially meaningless.

16. It should be noted that the draft Bill limits the intervention of national government to situations where regional efficiencies and economies of scale are negatively affected. However, this stipulation is itself broad and could be interpreted to cover myriad situations. This interpretation of this provision is supported by the explicit terms of Paragraph 2 of the Memorandum on the objectives of the Bill, which are discussed above.

Necessity

17. It is our understanding that the Constitution should be amended only when, and to the extent, necessary. As the founding document defining the character of our society, amendment should always, as a matter of principle, be approached with great caution.
- 18.1 In regard to the present Bill, it is submitted, firstly, that the additional powers it proposes to grant to national government are unnecessary in order to address the EDI issue at hand. (See for example, paragraph 9 above)
- 18.2 Under Schedule 4 to the Constitution, 1996, the national government has always had a prevailing power over the provinces in respect of their joint oversight responsibility in respect of the effectiveness of municipalities, taking into account to matters of national regulation and uniformity. Even under Schedule 5, which gives provinces exclusive control over certain functional areas relating to its role of overseeing municipalities, the national government can intervene "in order to maintain national security, economic unity, maintain essential national standards, establish minimum standards for services, or prevent harmful or unreasonable action by a province." (Section 100(1) of the Constitution)
19. The Bill does stipulate that organised local government and the Financial and Fiscal Commission must be consulted before the national legislation is enacted. However, this does not place any real constraint on the national government, as those entities do not have any binding authority over national government. Local governments' and the Financial and Fiscal Commission's recommendations need only be "considered" before national legislation is enacted.
20. Electricity governance is a legitimate area of concern that needs to be urgently addressed in South Africa. Indeed, the electricity sector has, for a number of years, been characterised by considerable uncertainty and frequent policy, planning and regulatory shifts. Many of these changes, including very recent developments, have been piecemeal, and even contradictory at times. One example is Eskom's Independent Power Producer Programme, recently withdrawn due to poor planning and unresolved legal issues.
21. Giving national government control over the EDI restructuring may yet be a prudent course of action in all the circumstances, whether or not in the manner discussed above. However, it is submitted that a broad constitutional amendment, as proposed by the department, is not the appropriate means to achieving that objective.

Concurrent powers of provincial government

22. In terms of 155(6) of the Constitution, municipalities must be established, monitored, supported and developed by provincial government. The effect of the Bill is to significantly alter the current constitutional and legal provisions relating to national, provincial and local spheres of government in South Africa, and effectively to significantly reduce the powers of the provinces in certain circumstances,
23. It is submitted that such profound changes to South Africa's constitutional and co-operative governance structures, affecting both municipal and provincial spheres of government, must be considered carefully, taking into account the legitimate needs and interests of all stakeholders, before being implemented. In that sense, the draft Bill is premature.
24. In 2007, the Department of Provincial and Local Government (DPLG) conducted a review of the system of provincial and local government that was established in 1996 as part of the negotiated constitutional settlement. One of the key issues addressed in the review is refining and redefining intergovernmental roles. The results of this ongoing review should be carefully analysed before implementing any legislation that significantly alter the balance of powers between national, provincial and local governments. It would be beneficial to consult with the successor Department of Cooperative Governance and Traditional Affairs to identify inefficiencies and other problems with intergovernmental roles, and work from there to develop legislative solutions that specifically and comprehensively, and in a coordinated manner, address the inefficiencies and other problems identified.
25. Indeed, President Jacob Zuma's new government has made a number of recent statements indicating that it is interested in pursuing consideration of the constitutional position of provinces, and their powers and functions. These statements suggest recognition of the need to proceed with deliberate caution when encountering matters of such profound significance.

Judicial Review

26. We are aware of the view that subsection (1A)(a) can be interpreted in a manner that excludes the possibility of judicial review, and of the application of the provisions of the Bill of Rights. To the extent that this view is accurate, we would strongly recommend that it be rephrased to allow continued scrutiny by the courts of all legislation, and the continued relevance of *inter alia* the protections afforded by the Constitution.

Concluding remarks

27. Because South Africa has such a young democracy, it is important that government powers and intergovernmental relations be reviewed and possibly

modified to help South Africa develop into a more efficient country. However, this is not a process that should be undertaken hastily.

28. Specific problems must be identified and addressed individually, yet also in a coordinated manner, with a clear framework in view. Where, however, that framework remains subject to ongoing review, as is presently the case in regard to the future of the provincial sphere of government or of individual provinces, it is prudent to avoid creating either a blanket amendment, or an awkward precedent, that takes significant powers away from provincial government.
29. Overall, there seems to be a lack of congruence between the relatively narrow issue being addressed and the instrument of an overly broad constitutional amendment that grants national government significantly greater control over local government in a wide range of circumstances.

Yours sincerely



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