Constitutional Opinion: The Path to Reforming Section 1(d) and Establishing Direct Independent Representation in South Africa

Prepared for:

IRASA (Independent Ratepayers Association of South Africa) — www.irasa.org.za

Reference: Koingnaas KBBV High Court Case & IRASA Constitutional Reform Proposal

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1. Preliminary Statement

This opinion is prepared in response to the following core proposition advanced by IRASA:

> *"We have to get the constitution reformed first before we can successfully move forward with any of these ideas. Clause 1(d) is our 1st and most important hurdle to change from a multi-party system to a direct independent only system with DIRECT accountability to the constituents only. The constituents within a ward or municipality are the owners and leaders; the elected representative will only be the servant of the people."*

This document provides a structured legal and constitutional analysis of: (1) the exact nature of the hurdle posed by Section 1(d); (2) the procedural requirements for amending it; (3) the political feasibility of such an amendment in the current Parliament; (4) the critical jurisprudential breakthrough already achieved by the Constitutional Court; and (5) the most strategically viable pathway forward for IRASA and the broader independent governance movement.

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2. The Foundational Problem: Section 1(d) of the Constitution

Section 1 of the *Constitution of the Republic of South Africa, 1996* establishes the founding values upon which the entire constitutional order rests. Section 1(d) provides:

> *"The Republic of South Africa is one, sovereign, democratic state founded on the following values: ... (d) Universal adult suffrage, a national common voters roll, regular elections and a **multi-party system of democratic government**, to ensure accountability, responsiveness and openness." [1]*

This provision does three things simultaneously. It entrenches universal suffrage, regular elections, and a multi-party system as co-equal foundational values of the state. The phrase "multi-party system of democratic government" is the specific language that IRASA identifies as the primary constitutional obstacle to a system of purely independent, constituency-accountable representatives.

2.1 What Does "Multi-Party System" Actually Mean?

It is important to understand the precise constitutional meaning of this phrase before assessing the scope of the hurdle. The Constitutional Court addressed this question directly in the landmark 2020 case of *New Nation Movement NPC and Others v President of the Republic of South Africa* [3]. The majority judgment, delivered by Madlanga J, held that the "multi-party" references in the Constitution were historically intended to guarantee that South Africa could never revert to a **one-party authoritarian state** — as it had experienced under apartheid's National Party monopoly [8].

The Court explicitly held that the "multi-party" language does **not** prohibit independent candidates from standing for election, nor does it mandate that *only* political parties may participate in governance [8]. The provision guarantees the right of multiple parties to exist and compete; it does not create an exclusive monopoly for parties. This is a crucial and often misunderstood distinction.

2.2 The True Scope of the Hurdle

The honest assessment is that Section 1(d) presents a **graduated hurdle** rather than an absolute wall. It presents:

Scenario	Requires Amendment to Section 1(d)?	Legal Basis
Independent candidates standing alongside parties	**No**	*New Nation Movement* [2020]; Electoral Amendment Act 2023
Constituency-based accountability for elected representatives	**No**	Achievable via Electoral Act reform
Abolishing political parties entirely	**Yes**	Would require removing "multi-party system" from Section 1(d)

Scenario	Requires Amendment to Section 1(d)?	Legal Basis
Prohibiting parties from fielding candidates	**Yes**	Directly conflicts with Section 1(d) and Section 19
Creating a system where independents and parties co-exist, but independents are directly accountable to wards	**No**	Achievable within current constitutional framework

The conclusion is that IRASA's core goal — **direct accountability of elected representatives to their constituents, free from party-political interference** — is already achievable within the current constitutional framework, without first amending Section 1(d). The amendment becomes necessary only if the goal is the *complete exclusion* of political parties from governance.

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3. The Constitutional Amendment Procedure: Section 74

If IRASA ultimately determines that a full amendment to Section 1(d) is necessary, the procedure is governed by Section 74(1) of the Constitution, which imposes the most stringent requirements of any provision in the constitutional text [7].

3.1 The 75% Supermajority Threshold

Section 74(1) provides that Section 1 and Section 74 itself may only be amended by a Bill passed by:

1. The **National Assembly**, with a supporting vote of **at least 75% of its members** (i.e., 300 of 400 members); **and**
2. The **National Council of Provinces (NCOP)**, with a supporting vote of **at least six of the nine provincial delegations** [7].

This is the highest amendment threshold in the Constitution. For context, amending the Bill of Rights (Chapter 2) requires only a two-thirds majority (266 of 400 members) [7]. The 75% threshold for Section 1 reflects the framers' intention that the founding values of the state should be near-immutable, requiring near-universal consensus to change.

3.2 Additional Procedural Requirements

Beyond the supermajority, the following procedural steps are mandatory [7]:

- The proposed amendment must be published in the Government Gazette for **public comment at least 30 days before introduction** in Parliament.
- The amendment must be submitted to all **provincial legislatures** for their views before it is tabled.
- A Bill amending the Constitution **may not be put to a vote** in the National Assembly within **30 days of its introduction**.
- The amendment Bill **may not include non-constitutional provisions** — it must be a standalone constitutional amendment Bill.

3.3 The Political Feasibility: A Candid Assessment

The 2024 National Elections produced a highly fragmented National Assembly with 18 parties represented. The current seat distribution is as follows [4]:

Party	Seats	% of Vote
African National Congress (ANC)	159	40.18%
Democratic Alliance (DA)	87	21.8%
uMkhonto weSizwe (MK)	58	14.59%
Economic Freedom Fighters (EFF)	39	9.52%
Inkatha Freedom Party (IFP)	17	3.85%
Patriotic Alliance (PA)	8	2.05%
Freedom Front Plus (FF+)	6	1.36%
Action SA	6	1.19%
Other parties (11)	20	~5.46%
Total	**400**	**100%**

To achieve the 300 votes required to amend Section 1(d), an unprecedented coalition of nearly *all* parties in the National Assembly would need to vote in favour. This is politically improbable for a fundamental reason: **political parties are the primary**

beneficiaries of the multi-party system. Asking them to vote for a constitutional amendment that diminishes their own power and potentially their own existence is akin to asking a corporation to vote for its own dissolution. The ANC, DA, MK, and EFF — who collectively hold 343 seats — each have powerful institutional incentives to preserve the party-political system.

Furthermore, the MK party and EFF, who together hold 97 seats, have consistently opposed the GNU framework and are unlikely to cooperate on any constitutional reform that does not serve their partisan interests. This makes the 300-vote threshold currently unattainable.

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4. The Critical Breakthrough: *New Nation Movement* and the Electoral Amendment Act

The most important strategic insight for IRASA is that the Constitutional Court has already done much of the heavy lifting. The 2020 *New Nation Movement* judgment and the subsequent Electoral Amendment Act of 2023 represent a paradigm shift that makes the immediate amendment of Section 1(d) unnecessary for achieving the core goal of direct constituent accountability.

4.1 The *New Nation Movement* Judgment (2020)

The Constitutional Court, in a majority judgment, declared the Electoral Act 73 of 1998 unconstitutional to the extent that it required adult citizens to be elected to the National Assembly and Provincial Legislatures *only* through membership of political parties [3]. The Court held that this restriction unjustifiably infringed on:

- The **right to freedom of association** (Section 18 of the Constitution), by coercing citizens to associate with a political party as a precondition for exercising their political rights.
- The **right to freedom of conscience** (Section 15), by denying a representative the ability to exercise free will in the interests of their constituency.
- The **right to dignity** (Section 10), by treating citizens as incapable of meaningful political participation outside of party structures [8].

The Court gave Parliament 24 months to remedy the defect in the Electoral Act. Critically, the majority explicitly addressed the "multi-party" language in Section 1(d) and held that it does not prohibit independent candidates. This is the judicial interpretation that IRASA must anchor its strategy upon.

4.2 The Electoral Amendment Act 1 of 2023

Parliament responded to the Constitutional Court's order by passing the Electoral Amendment Act 1 of 2023, which formally allows independent candidates to contest seats in the National Assembly and Provincial Legislatures [9]. This Act was signed into law by the President on 17 April 2023 and was first applied in the 2024 National Elections.

While no independent candidates ultimately won seats in the 2024 National Assembly elections [4], the legal framework is now firmly in place. The challenge is now one of **political organization and electoral strategy**, not constitutional law.

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5. The Koingnaas Case: The Urgency of Reform

The *Kamiesberg Local Municipality v KBBV* judgment [2] provides the most compelling practical argument for why the IRASA model of direct accountability is urgently needed. The case demonstrates the tragic paradox at the heart of South Africa's local government crisis:

- Municipalities are constitutionally mandated to deliver basic services (water, sanitation, roads) under Section 152 and 153 of the Constitution.
- The Kamiesberg Local Municipality, controlled by party-political structures, was financially bankrupt, spending only **0.3% of its asset value on maintenance** (against the required 8% norm), taking **1,400 days to pay creditors**, and losing **52% of its piped water** to leaks [2].
- When the community organized through the KBBV ratepayers' association and conducted emergency repairs, the municipality — rather than welcoming the assistance — obtained a court interdict to *stop* them [2].
- The High Court upheld the interdict, ruling that private citizens cannot usurp municipal functions, and that the remedy lies in Section 139 provincial interventions [2].

The court's ruling is legally correct. But it exposes the fundamental dysfunction of a system where elected representatives are accountable to their party bosses rather than to the residents who pay their salaries through rates and taxes. A councillor who is directly accountable to the KBBV ratepayers — as IRASA proposes — would never have sought an interdict against the community. The Koingnaas case is the strongest possible argument for the IRASA model of governance.

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6. Strategic Roadmap: The Most Viable Path Forward

Based on the legal analysis above, the following three-phase strategy represents the most viable and legally sound pathway to achieving IRASA's vision of direct constituent accountability.

Phase 1: Maximize Independent Representation Under Existing Law (Immediate — 2024 to 2029)

The legal framework now exists. The priority is to build a critical mass of independent representatives at the local government level, where IRASA has already established a presence.

Action 1.1 — Strengthen the IRASA Shield Model at Local Government Level. IRASA's existing model of using a registered political party as a "shield" for community-selected candidates is legally sound and immediately deployable. The organization should expand this model aggressively to failing municipalities across South Africa, particularly in the Northern Cape, Limpopo, and Mpumalanga, where municipal collapse is most severe.

Action 1.2 — Formalize Constituent Accountability Agreements. Every IRASA-backed candidate should sign a legally binding constituent mandate agreement, specifying that their vote in council will be directed by the outcome of regular public ward meetings. This creates the "servant of the people" dynamic in practice, regardless of the constitutional text.

Action 1.3 — Litigate for Structured Remedies, Not Takeovers. The Koingnaas case teaches that communities must not attempt unilateral self-help. Instead, IRASA-backed councillors should use their positions to compel Section 139 provincial interventions in collapsed municipalities, following the precedents set in *Makana* (2020) and *Lekwa* (2021).

Phase 2: Electoral Law Reform (Medium Term — 2025 to 2029)

Ordinary legislation (requiring only a 50%+1 majority in the National Assembly) can dramatically strengthen direct accountability without touching Section 1(d).

Action 2.1 — Lobby for a Stronger Constituency-Based Electoral System. The current proportional representation system allows parties to fill seats from national lists, meaning many MPs have no direct geographic constituency. Lobbying for a shift toward a mixed-member proportional system with stronger constituency components would force all representatives — party or independent — to be accountable to a specific geographic community.

Action 2.2 — Anti-Defection and Anti-Floor-Crossing Legislation. Lobby for legislation that legally binds elected representatives to the mandate of their constituents rather than their party. This could include provisions that trigger a by-election if a representative votes against a documented community mandate.

Phase 3: Constitutional Amendment (Long Term — Post-2029)

If IRASA and the independent movement successfully build a substantial bloc of independent representatives in Parliament over the 2029 and 2034 election cycles, the political arithmetic for a constitutional amendment may eventually become viable.

The Proposed Amendment Text: Rather than seeking to abolish the multi-party system (which would be maximally disruptive and face the greatest resistance), the most viable amendment would be additive in nature:

> *Proposed new Section 1(d): "Universal adult suffrage, a national common voters roll, regular elections and a multi-party and independent constituency-based system of democratic government, to ensure accountability, responsiveness and openness."*

This formulation preserves the multi-party guarantee (preventing one-party rule) while explicitly enshrining independent, constituency-based representation as an equally protected founding value. It is a reform, not a revolution, and is therefore more likely to attract the broad coalition needed for a 75% majority.

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7. Opinion on the Most Likely to Succeed Approach

The most likely to succeed approach is NOT to attempt the constitutional amendment first. The following reasoning supports this conclusion.

The constitutional amendment of Section 1(d) requires 300 of 400 National Assembly votes. In the current political landscape, this is unattainable. Pursuing it as the primary strategy would consume enormous resources, generate intense political opposition, and likely fail — potentially discrediting the broader movement.

The most likely to succeed approach is a **ground-up, incremental strategy** that:

3 **Exploits existing law** — The *New Nation Movement* judgment and the Electoral Amendment Act of 2023 already permit independent representation. This is the immediate opportunity.

4 **Builds from local government upward** — Local government is where the crisis is most acute, where IRASA already has a presence, and where the IRASA model is most directly applicable. Winning at the local level builds credibility and political capital.

5 **Uses the courts strategically** — Rather than fighting the municipality (as KBBV did), IRASA-backed representatives should use the courts to compel Section 139 interventions, force accountability on misappropriated funds (like the R21 million De Beers grant in Koingnaas), and progressively develop the jurisprudence of constituent accountability.

6 **Builds toward constitutional reform** — As independent representatives accumulate seats over successive election cycles, the political arithmetic for a Section 1(d) amendment gradually improves. The constitutional amendment is the destination, not the departure point.

The IRASA model is constitutionally sound, legally viable, and urgently needed. The Koingnaas case proves that the current system is broken beyond self-repair. The *New Nation Movement* case proves that the Constitution already supports the vision. The strategy is to build the movement from the ground up, one ward, one municipality, one province at a time.

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8. References

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