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**LEGAL OPINION**  
**[Confidential]**

**TO:** Honourable E Mthetwa, MP  
Co-Chairperson: Constitutional Review Committee

**AND TO:** Honourable Dr M Motshekga, MP  
Co-Chairperson: Constitutional Review Committee

**COPY:** Mr. P Tyawa  
Secretary to Parliament

**FROM:** Constitutional and Legal Services Office  
[Adv. Z Adhikarie – Chief Parliamentary Legal Adviser]

**DATE:** 30 November 2020

**SUBJECT:** Submission from Free Market Foundation to the Constitutional Review Committee on Constitutionalism (CRC Ref 34 of 2020)

**REFERENCE:** 137/2020

Please find attached a legal opinion in respect of the above-mentioned matter.

  
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Adv. Z Adhikarie  
Chief Parliamentary Legal Adviser

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## MEMORANDUM

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**TO:** Honourable E Mthetwa, MP  
Co-Chairperson: Constitutional Review Committee

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Co-Chairperson: Constitutional Review Committee

**COPY:** Ms. P Tyawa  
Acting Secretary to Parliament

**FROM:** Constitutional and Legal Services Office  
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## INTRODUCTION

1. Our Office was requested to advise the Joint Constitutional Review Committee (JCRC) on the submission received from the Free Market Foundation in response to the JCRC's annual invitation for public submissions on the review of the Constitution.

## **BACKGROUND**

2. The Free Market Foundation (FMF), firstly, submits that section 1 of the Constitution has been neglected in public policy. It is submitted that section 1 is the most entrenched provision in the Constitution and contains the values that must inform all law and government conduct; namely, the advancement of human rights and freedoms, non-racialism and non-sexism, the Rule of Law, and constitutional government.
3. Secondly, the FMF refers to the importance of impact assessments in public policy. The submission discusses impact assessment as a constitutional imperative that government has also neglected. Impact assessments are seen as a tool to inform the public about the potential unintended and detrimental consequences of new legislation, regulation, and policies, and must be fair and balanced. Without such assessments, public participation in government is undermined.
4. Thirdly, The FMF elaborates on the nature of constitutionalism that government must take into account when performing its functions. In this regard the FMF refers to the Constitution Eighteenth Amendment Bill, and, what it considers a threat, the potential nationalisation of the Reserve Bank. It is submitted that both these envisioned interventions would “undermine the fabric of constitutionalism within which the Constitution rests” and must be rejected.
5. Lastly, the FMF refers to the nature and operation of sections 36 (the general limitations provision) and 37 (the derogation provision) of the Constitution, and how these provisions ought to (have) operate(d) during the COVID-19 lockdown. The FMF is concerned that government has acted unconstitutionally during “times of public crisis”, and encourages government to return to constitutional conformity.

## **ANALYSIS**

### **Section 1**

6. The FMF submits that the following is evidence that government has not complied with section 1:
  - 6.1. National Sport and Recreation Amendment Bill, 2020, Constitution Eighteenth Amendment Bill and the National Minimum Wage Act 9 of 2018 erode what section 1(a) guarantees; namely, human dignity, the achievement of equality and the advancement of human rights and freedoms.
  - 6.2. Government has engaged in racial rhetoric and public policy since the dawn of constitutional democracy in South Africa and justifications, in terms of the provi-

sions in the Constitution that must be read as compliant with section 1, and particularly section 1(b), which prohibits racialism, legally cannot do so. Section 1(b) of the Constitution proscribes racialism entirely. Government appears to be ignorant of this fact.

6.3. The Rule of Law, a fundamental pillar of the Constitution, is incompatible with the arbitrary exercise of public power such as expropriation without compensation, as an example.

### **Impact assessments**

7. The FMF submits that, since 2015 government has required the production and publication of socio-economic impact assessments on interventions such as new policies, regulations, and legislation. Despite this requirement, assessments are not conducted on some of the most important interventions; for instance, the Constitution Eighteenth Amendment Bill and the government response to COVID-19.
8. It is submitted that section 1(d) of the Constitution provides for the values that characterise constitutional government, including “accountability, responsiveness and openness”. Impact assessments are a useful way of measuring government’s responsiveness and openness, as they are a key enabler to substantive, good faith public participation. Furthermore, section 195(1)(g) of the Constitution, which provides that transparency “must be fostered by providing the public with timely, accessible and accurate information”, requires that policy or legislative interventions must be supported by demonstrable evidence.

### **Constitutionalism**

9. The FMF submits that the core idea of constitutionalism is that government must be explicitly permitted in law to perform any function it intends to perform. However, if the Constitution is to be amended, there must be a “drawn-out, years-long public consultation process to determine whether a national consensus exists.” The FMF submits that although the Constitution provides how an amendment must be processed, a government cannot act without a mandate, and a mandate to amend the country’s highest law must be firm and far broader than a single political party’s core constituency.
10. The FMF submits that Constitutionalism and the Rule of Law require long-term thinking, which recognises that the government of today is not the government of tomorrow, and that the outrage currently dominating public opinion will not always be around.
11. The FMF refers to their submission on the Constitution Eighteenth Amendment Bill and the process to nationalise the Reserve Bank through amendments to the South African Reserve Bank Act, 1989 as examples of threats to Constitutionalism.

## **Sections 36 and 37 and the COVID-19 lockdown**

12. The FMF comments on the COVID-19 regulations, in light of section 36 and 37 of the Constitution. In light of this, the FMF questions the constitutionality of the Disaster Management Act and the way the Act has been invoked in the crisis.
13. The FMF submits that severity of the COVID-19 lockdown, particularly on “so-called levels five and four, is so invasive into the rights of South Africans that it cannot be argued that those are mere limitations. Instead, those rights are derogated, or suspended. Here one can think of the prohibition on lockdown levels 4 and 5 of movement outside of the home unless for a small list of allowable circumstances.” Hence the FMF argues that freedom of movement, as guaranteed in section 21 of the Constitution, is totally absent.

## **DISCUSSION**

14. The submission from the FMF does not call for an amendment or a review of the Constitution. In fact, it argues against this in the case of the Constitution Eighteenth Amendment Bill, which it should be mentioned, is a Bill introduced by a committee of Parliament and hence there is not an impact assessment attached to it.
15. The gist of the submission is that government is acting unconstitutionally with reference to section 1 of the Constitution. However, the FMF should make this submission to the relevant committee of the National Assembly as it does not pertain to a review of the Constitution.
16. Impact assessment of policy and legislation is also not a constitutional review matter and the FMF does not advocate for this.

## **Conclusion**

17. I am of the view that the JCRC cannot take the submission any further. There is also no purpose in referring this submission to another committee and the FMF indicates it has already made the specific submission on the Bills it refers to.



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**Adv. Z Adhikarie**  
**Chief Parliamentary Legal Adviser**