



**PARLIAMENT**  
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**MEMORANDUM**

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

**COPY:** Secretary to Parliament

**DATE:** 17 September 2009

**SUBJECT:** Submission in respect of annual review of the  
Constitution – B J Mkhaliphi

**LEGAL ADVISER:** Adv F S Jenkins

**COMMITTEE REFERENCE:** 12

**REFERENCE NUMBER:** 147/09



## Legal Opinion

### Introduction

1. The submission from B J Mkhalihi questions whether the significance of the Constitution is appreciated in respect of the manner in which the text is distributed and its value promoted.

### Specific arguments in support of the submission

2. Firstly, the submission from B J Mkhalihi indicates that the "most recent copies of the Constitution in circulation, contain several embarrassing errata" and argues that the "oversight authority", which is Parliament, might need to proof-read and certify all updated editions of the Constitution.
3. Secondly, he enquires whether Parliament has a discretion to decide which national legislation required by the Constitution to enact. As an example the submission points out that the legislation envisaged in section 77(3) of the Constitution has been enacted whilst that envisaged in section 139(8) has not been enacted.
4. Thirdly, the submission argues that "Constitution Day, 10 May, seems to be disappearing on the national calendar".
5. Lastly and related to the issue around Constitution Day, the submission proposes that "the advancement of the Constitution as an on-going national project that



guides our democracy and enhances our efforts on national-building" should be enhanced.

### Analysis

6. As important as it may be, the responsibility to proof-read the printed version of the Constitution falls outside the responsibility of the Constitutional Review Committee (the Committee). Section 45(1)(c) of the Constitution, read with Joint Rule 102(1), requires the Committee "to review the Constitution at least annually".
7. Consequently, I am of the opinion that this issue is not a "constitutional matter" that the Committee is required to identify for the purpose of review as envisaged in Joint Rule 102(2)(b).
8. Furthermore, unless the publishing of the copy of the Constitution falls within the definition of "organ of state" in section 239 of the Constitution, it is doubtful whether Parliament has the responsibility to maintain oversight of such publishing. The submission does not indicate the origin of the printed copy to which it refers, so I am not in a position to advise further on the question of Parliament's responsibility. However, as it indicates that it might be a 2004 version, I am convinced it is not the latest printed version available as Juta & Co. (Ltd.) published the Constitution in the 8<sup>th</sup> edition of their Pocket Statutes in 2009.
9. I suggest that the Committee respond to this part of the submission by recommending to that the matter be referred to the publisher.



10. In respect of the question whether Parliament has a discretion to decide which national legislation required by the Constitution to enact, items 21 and 23 of Schedule 6 to the Constitution provide for timeframes to enact such legislation. Provision is made for specific timeframes, for instance legislation required in terms of sections 9(4), 32(2), 33(3) and 217(3) "must be enacted within three years of the date on which the Constitution took effect." Other legislation required in terms of the Constitution "must be enacted by the relevant authority within a reasonable period of the date the new Constitution took effect." With reference to similar wording used in item 13 of Annexure A to the Constitution, the Constitutional Court found that "[i]n determining what is a reasonable period within which such legislation could be passed, it is necessary to have regard to all relevant facts and circumstances" (see *United Democratic Movement v President of the RSA and Others* (1) 2002 (11) BCLR 1179 (CC), at par [105]). Furthermore, sections 2 and 237 of the Constitution, read together, provide that obligations imposed by the Constitution must be fulfilled diligently and without delay. In other words a Court can determine whether Parliament is fulfilling its obligation to enact legislation required by the Constitution. The conclusion is that Parliament does not have a discretion to choose whether to enact legislation required by the Constitution.

11. Be that as it may, section 139(8) provides that "national legislation may regulate the implementation of this section" (emphasis added). In contrast, section 77(3) provides that "[a]n Act of Parliament must provide for a procedure to amend money Bills before Parliament" (emphasis added). As the use of the word "may" indicates that the obligation is not peremptory, I conclude that the legislation envisaged in section 139(8) is not required in terms of the Constitution. In other words, Parliament has indeed a discretion whether to enact it or not. The issue of whether to enact it or not is thus a matter of policy and not a constitutional obligation.



12. Consequently, I am of the opinion that this issue is not a "constitutional matter" that the Committee is required to identify for the purpose of review as envisaged in Joint Rule 102(2)(b). I suggest that the question whether to enact the legislation envisaged in section 139(8) be referred to the Houses for consideration. Should the Committee decide to highlight this matter, it may report on it as an issue for consideration that falls outside its mandate.

13. As correctly pointed out in the submission, the issues of the value of Constitution Day and the on-going national project to advance the Constitution are matters outside the responsibility "to review the Constitution at least annually" provided for in section 45(1)(c), read with Joint Rule 102(1).

14. Consequently, I am of the opinion that this issue is not a "constitutional matter" that the Committee is required to identify for the purpose of review as envisaged in Joint Rule 102(2)(b). Should the Committee decide to highlight these issues, it may report on these as matters for consideration that falls outside its mandate.

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