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RULE OF LAW PROJECT
FREE MARKET FOUNDATION

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SUBMISSION TO THE *AD HOC* COMMITTEE ON THE FUNDING OF POLITICAL PARTIES ON THE POLITICAL PARTY FUNDING BILL, 2017

Attn: Ms E Grunewald, Secretary, *Ad Hoc* Committee on the Funding of Political Parties

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Free Market Foundation and Rule of Law Project

The Free Market Foundation (FMF)[1] is an independent public benefit organisation founded in 1975 to promote and foster an open society, the Rule of Law, personal liberty, and economic and press freedom as fundamental components of its advocacy of human rights and democracy based on classical liberal principles. It is financed by membership subscriptions, donations, and sponsorships.

Most of the work of the FMF is devoted to promoting economic freedom as the empirically best policy for bringing about economic growth, wealth creation, employment, poverty reduction, and greater human welfare.

The FMF's Rule of Law Project is dedicated to promoting a climate of appreciation throughout South Africa, among the public and government, for the Rule of Law; continually improving the quality of South African law; identifying problematic provisions in existing and proposed laws, and, where feasible, advocating rectification.

Introduction

On 16 May 2018, the *Ad Hoc* Committee on the Funding of Political Parties in the National Council of Provinces called for comments on the Political Party Funding Bill (B33-2017). This submission by the FMF focuses attention on a broad problem permeating the whole bill.

The principle that citizens should know who is funding their political leaders is implicit in the notion of *nihil de nobis, sine nobis* ("nothing about us, without us"), meaning that when decisions are taken for us we have the right to be involved in every step of the process, including knowing who all the interested stakeholders are. *Nihil de nobis* is also an implied feature of the Rule of Law, a principle entrenched in section 1(c) of our highest law, providing for the supremacy of the Constitution and the Rule of Law. Context, however, matters, and by only mandating transparency in the funding of political parties, South Africa is naively marching into a situation where we might be guaranteeing the end of strong opposition politics.

There has been little public criticism of the Bill, yet it has potentially disastrous unintended consequences in store for our democracy. Ostensible public consensus is never a good sign for a healthy and engaged civil society.

The Rule of Law

The Rule of Law, while a somewhat contested doctrine, is all about limiting arbitrariness in governance. Madala J provided a very apt description of it in his minority judgment in *Van der Walt v Metcash Trading Limited*. The Rule of Law means "the absence of arbitrary power" (no broad discretionary powers), "equality before the law" (everyone, including the political class, are bound by the same law under the jurisdiction of the ordinary courts), that the law protects certain basic human rights, and that it excludes unreasonableness and unpredictability.[2]

This largely echoes the sentiment of Albert Venn Dicey, the progenitor of the notion of the Rule of Law. Dicey wrote in his *An Introduction to the Study of the Law of the Constitution* that the Rule of Law

1 www.freemarketfoundation.com

2 *Van der Walt v Metcash Trading Limited* 2002 (4) SA 317 (CC) paras 65-66.

means "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even wide discretionary authority on the part of the government".[3] Succinctly, the Rule of Law is an aversion to arbitrariness.

Parliament has been negligent – almost delinquent – in its disregard for the Rule of Law, and this is not a new trend. In practically every new piece of legislation passed by the legislature, broad discretionary powers are assigned to functionaries in the executive government. Provisions that empower officials to revoke licences if they believe a business is no longer providing "efficient" service are rife, making an appearance as recently as in the newly-published Electronic Communications Amendment Bill, 2017. Without objective criteria forcing the official to check boxes before simply 'deciding' that the service is inefficient, the official is assigned unbridled discretionary power guided only by the universally-ignored provisions of section 195 of the Constitution (which lists the principles that are supposed to govern the public administration).

To be clear, this criticism is not against the current national government *per se*. The National Party regime and the courts of yesteryear gave a lot of lip-service to adherence to the Rule of Law, but it was widely documented that the doctrine was disregarded as a matter of course.

Judge HHW de Villiers, in a speech to the Second National Law Conference in Port Elizabeth in 1962, went to great lengths to describe what the Rule of Law means, but added a proviso: The principle of parliamentary sovereignty superseded it, and Parliament could do as it pleased. Professor Tony Mathews, in his *Law, Order and Liberty*,[4] described in detail the extent to which Apartheid security laws were incompatible with the most basic elements of the Rule of Law, like non-retrospectivity and accessibility. Even contemporarily, where opposition parties govern as well, provincial legislation and municipal bylaws leave much to be desired as far as adherence to the Rule of Law is concerned. This criticism is thus of a broad trend in South Africa – and abroad – of disregard for the Rule of Law.

But whereas in other countries there are counterbalances to ensure non-adherence to the strict precepts of the Rule of Law do not lead to dictatorship, South Africa has no such precaution. In the United States, where the Rule of Law is similarly disregarded by Congress when it assigns wide, almost absolute discretionary powers to the executive government (the Immigration and Nationality Act being only one example), an almost religious devotion by civil society to the first ten amendments to that country's constitution ensures that government is watched like a hawk, as far as basic liberties and the functioning of their democracy relate.

In South Africa, a young and developing democracy with institutions still finding their feet, civil society's strong condemnations of public conduct have often been met with shrugs and the now infamous chuckle of former President Jacob Zuma. The al-Bashir saga – nothing less than a constitutional crisis where the constitutional authority of the judiciary was simply ignored – still looms large over the question of whether our democracy functions as it should. For this reason, South Africans should be mindful of the quality of our legislation and the potential unintended consequences that apparently well-meaning laws could entail.

The Political Party Funding Bill is no exception.

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3 Dicey AV. *An Introduction to the Study of the Law of the Constitution*. (1959, 10th edition). London: Macmillan. 120.

4 Mathews AS. *Law, Order and Liberty in South Africa.* (1971). Cape Town: Juta & Co.

Arbitrariness

With Parliament's flagrant disregard for the Rule of Law and its assignment of wide discretionary powers to the executive, a bill outlawing the anonymity of those who fund opposition parties is nothing short of a clear threat to democracy. This is best illustrated with a thought experiment:

Say, ABC Telecoms is one of South Africa's big mobile operators. To function, it, like all the other firms in the sector, relies on radio-frequency spectrum, a limited resource strictly controlled by government. Without spectrum, its business would grind to a halt. In terms of the law governing the allocation of spectrum, the Director-General of the Department of Telecommunications is empowered to withdraw a firm's spectrum licence if the DG is satisfied that the firm no longer utilises the spectrum "efficiently".

The law, like virtually all other legislation passed by Parliament, contains no criteria that sets out how this discretionary power is to be exercised. "Efficiently" is nowhere defined in the law and the DG's "satisfaction" is not linked with any objective legal principles. The next provision, in a weak effort to create a veneer of legality, simply requires that any decision taken by the DG must be served upon the firm by notice within seven days and that the firm may make representations as to why the licence must not be withdrawn. This criterion, clearly, has no consequential effect on the decision itself.

The CEO of ABC Telecoms, John Doe, is a politically-engaged member of the community. In his personal capacity, he provides funding to the Progressive People's Party, the Official Opposition. The Minister of Telecommunications is a member of the ruling party, the Neoliberal Alliance. The DG, too, despite the Constitution's assurance that the civil service is non-partisan, is obviously also a member of the Neoliberal Alliance, as is customary. John Doe, knowing that the law provides the DG a broad discretionary power to simply withdraw spectrum licences, funds the Progressive People's Party (the DG's political rivals) anonymously.

Now, the Political Party Funding Bill becomes law, and John Doe knows he will lose his anonymity. If his funding of the Official Opposition becomes public knowledge, Doe believes ABC Telecoms' spectrum licence will be withdrawn (or subtly threatened to be withdrawn), because the DG is at liberty to find just about any reason to decide that the spectrum is not being used "efficiently". Rationally, Doe will stop funding the Progressive People's Party.

This is not to say that the DG would do or think about doing this at all. The perception, and more crucially the legal possibility, that this could happen, is sufficient to threaten the integrity of our democracy.

While it is true that funders of the ruling party may also wish to revoke funding in light of the Bill to avoid the same fate as Bell Pottinger and KPMG, they do not face the potential of victimisation by government. They might lose business because of an association with the ruling party, but that is not a Rule of Law concern. Arbitrary treatment at the hands of government, on the other hand, is.

What, then, is the solution?

Reining in discretionary powers

Legislatures in all spheres of government, but especially Parliament, must immediately cease with the habitual assigning of wide discretionary powers to the executive government. It must also review all existing legislation assigning discretionary powers. In place of open-ended discretion, Parliament must prescribe criteria according to which the discretion may be exercised. Better yet, Parliament must

enumerate the situations for which the discretion may be exercised, and in all other situations, the official must act mechanically.

For instance, in the above example, spectrum licences should be deemed to be approved if the correct paperwork has been submitted, and those licences must only be withdrawable if an independent commission, in open proceedings with expert testimony, has determined that the use of the spectrum is inefficient. And even then, the firm must be allowed to contest the decision, and be allowed a reasonable time to correct its use of the spectrum before the licence is finally withdrawn. Ideally, what is and what is not 'efficient' must be determined by the market. This is but one example.

Crucially, all potentially open-ended terms in all legislation must be defined, especially, so-called, "public interest".

In the Good Law Project's *Principles of Good Law* report,[5] commissioned by the Department of Justice, the Project includes a handy checklist that Parliament can – and should – use to determine whether a piece of legislation complies with the requirements of constitutionality and the Rule of Law.

Among the things Parliament must 'check' for is whether any provision is vague (and especially if the meaning of any of the words in that provision are ambiguous), whether a clear purpose for the introduction of the law exists, and whether the provisions in the legislation can reasonably achieve that purpose. Many of the items in the checklist can only be checked off after an independent socio-economic impact assessment (SEIA), or a cost-benefit analysis, has been conducted.

Socio-economic impact assessments

The Department of Planning, Monitoring, and Evaluation (DPME) mandates that SEIAs be conducted for policies, regulations, and legislation,[6] but this directive has often either been ignored or watered down to the point of redundancy. Countless laws, regulations, and policies are introduced without any published SEIA despite the fact that the DPME's guideline states that SEIAs must be so published. Without publication, the purpose of SEIAs are defeated.

The opposite of arbitrariness is reasonableness, requiring rationality and proportionality. Proportionality means that there must not be an imbalance between the adverse consequences of a measure and the beneficial consequences. Rationality means that evidence must support the measure. Stated differently, there must be a rational connection between the purpose of the measure and the solutions proposed.

It stands to reason that the requirement of rationality, read together with 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 policy or legislative measures to be supported by demonstrable evidence.

To determine whether a policy or law will have the consequence intended by the enacting authority, a study must be done as a matter of course, and be made publicly available to satisfy the principle of transparency. If a study is not conducted, it means the intervention is not supported by evidence and is, therefore, irrational and unconstitutional. If a study is not released to the public, government is failing to comply with section 195(1)(g), and the process is, thus, unconstitutional. Without published

5 Good Law Project. *Principles of Good Law*. (2016). Johannesburg: Good Law Project.

6 Department of Planning, Monitoring and Evaluation. "Socio-Economic Impact Assessment System (SEIAS): Guidelines." (2015). *DPME.*

SEIAs, government is called upon to *judge for itself* whether its own policies are reasonable. Such a state of affairs would make the Rule of Law a redundant concept.

For the people to have a say in the decisions that affect their lives (the *nihil de nobis* principle), they must know how, and on what basis, the decision was arrived at, and their participation must be meaningful (in other words, government must engage in good faith) and not merely a façade. Without a SEIA, the public cannot participate in the policy-making and law-making process as mandated by the Constitution.

While the parliamentary *Ad Hoc* Committee on Parliamentary Funding is not bound by the DPME's directive, it is a lapse in good governance to omit conducting a SEIA on a bill so fundamental to South Africa's democracy that Lawson Naidoo, Executive Director of the Council for the Advancement of the South African Constitution, said that this "is one of the most important pieces of legislation since the Constitution was passed".[7] The consequences of the Bill are, for the most part, anyone's guess, but combined with Parliament's tendency to assign wide discretionary powers, it is not a risk South Africa should take.

Whereas the Bill is intended to give voice to international anti-corruption measures agreed to by South Africa, it might perversely enable corruption of the highest order.

Conclusion

If South Africa is to mandate transparency in political party funding, we need to do more. Parliament must be compelled to adhere to section 1(c) of the Constitution and respect the tried-and-tested tenets of the Rule of Law. Only then should well-intended statutes like the Political Party Funding Bill be considered, otherwise we potentially condemn ourselves to one-party politics for the foreseeable future.

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This submission originally appeared as an analysis, by the same author, on GoLegal.co.za and has been adapted for present purposes.

[7] Phakathi B. "Party funding bill gets the nod from committee". (2017). *Business Day*. Available online: https://www.businesslive.co.za/bd/national/2017-11-29-party-funding-bill-gets-the-nod-from-committee/.