Ulawulo Lomthetho/Ngokomthetho
Puso ya Molao
Oppergesag van die Reg

RULE OF LAW PROJECT
FREE MARKET FOUNDATION

August 2018

SUBMISSION TO THE

DEPARTMENT OF ENVIRONMENTAL AFFAIRS

ON THE DRAFT

CLIMATE CHANGE BILL, 2018

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1. 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[2] 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.

2. Introduction

On 8 June 2018, the Department of Environmental Affairs invited comments on the proposed draft Climate Change Bill. This period endured until 8 August 2018.

The FMF is concerned that other matters in the national political discourse, such as calls for expropriation without compensation, have overshadowed the debate on the Bill. This has predictably led to insubstantial public participation, which severely undermines the legitimacy of the proposed law.

There are two problems in the Climate Change Bill that animate the FMF's opposition to the proposed legislation. Firstly, the Bill assigns wide and unconstrained discretionary and law-making power to the Minister of Environmental Affairs or their delegates, which is inconsistent with section 1(c) of the Constitution. Secondly, the notion of "carbon budgets" as introduced by the Bill into South African law indicates a deep-seated disregard for personal freedom and for economic growth. Carbon budgets may similarly fall foul of the right to equal protection of the law contained in the Constitution.

We propose, firstly, that the Bill be withdrawn and the concerns in this submission addressed, and secondly, if the Bill is reintroduced for public participation, enough time be given for more stakeholders to engage, mindful of the political context dominating our discourse.

3. Climate Change Bill

There are two problems in the Climate Change Bill that animate the FMF's opposition to the proposed legislation. Firstly, the Bill assigns wide and unconstrained discretionary and law-making power to the Minister of Environmental Affairs or their delegates, which is inconsistent with section 1(c) of the Constitution. Secondly, the notion of "carbon budgets" as introduced by the Bill into South African law indicates a deep-seated disregard for personal freedom and for economic growth. Carbon budgets may similarly fall foul of the right to equal protection of the law contained in the Constitution.

The principles of constitutionalism and the Rule of Law will be considered after the discussion on the Bill.

1 www.freemarketfoundation.com.
2 www.ruleoflaw.org.za.

3.1 Discretionary and law-making powers

Section 11(2) provides that the Minister's national greenhouse gas emissions trajectory binds government as well as "all persons to the extent applicable". It is very unclear how this would bind anyone. If the Minister sets a trajectory, to what extent must specific persons comply? If a certain industry has emitted the bulk of greenhouse gasses, will a different industry, which emits very low levels of greenhouse gasses, but which pushes the country over the threshold, be held liable? How will ordinary civilians be held liable? This is all unclear, and could lead to selective prosecution (if not persecution). This level of open-endedness is incompatible with South Africa's commitment to the Rule of Law.

Section 12(1) provides that the Minister must "determine [sectoral emissions targets] for greenhouse gas emitting sectors and sub-sectors" every five years. This is an unrestrained law-making power and could possibly violate the section 9(1) guarantee of equality before the law in the Constitution. If these determinations are sector-wide, how will individual juristic persons be held liable? Will all persons be required to emit the same levels of greenhouse gasses; will all persons be limited to a specific emission target, and if so, will it be determined absolutely or proportionally? Presumably, this power is given to the Minister to decide, but, as with the above, it will fall foul of the Rule of Law. But it will also be problematic for equality before the law, given how different sectors can, in terms of the Bill, be treated differently in an arbitrary fashion. This can be rectified if strict criteria, in which the Minister must comply when making their determinations, are introduced.

Section 15 of the Bill empowers the Minister to make regulations. The powers under this section are unconstrained and absolute, and thus contrary to the Rule of Law that requires the regulatory power to be exercised subject to objective criteria and legal principles.

Section 15(2) is problematic in that it provides that the Minister may in a regulation provide that if that regulation is not complied with, fines of up to R10 million and imprisonment of up to ten years can be imposed. Non-compliance with executive fiat should not carry such severe penal consequences. Parliament is democratically empowered to make law, not the Department of Environmental Affairs. This provision should be removed. The offences provision in section 19 for non-compliance with the legislation itself is sufficient, if not themselves too severe.

3.2 Carbon budgets

Section 13 of the Bill makes provision for so-called "carbon budgets", which is an allowance of greenhouse gas emissions allocated to a natural or juristic person over a defined time period.

Section 13(4) provides that the Minister "*must* allocate a carbon budget that is applicable to a *specific person*" (our emphasis). Section 13(9)(a) obliges those subjected to carbon budgets to comply with those budgets. This unrestrained power could violate the section 9(1) guarantee of equality before the law.

The language of the Bill strongly implies that carbon budgets will be applicable to private persons – whether natural or juristic. This means government can simply pick and choose which persons to apply the carbon budget provisions to and thereby create onerous compliance conditions for those specific persons. This could lead to political targeting, victimisation, and regulatory bullying. Moreover, this creates a concern for individual and economic freedom. The implications of this Bill is that the amount of gasses people can emit with their cars and with their businesses will now be controlled, and quite arbitrarily at that. This is not conducive for a free society, or for a society that desperately needs quick and sustained economic growth.

We recommend the provisions relating to carbon budgets apply exclusively to government and those industries (voluntarily) subsidised by government.

4. The Constitution and the Rule of Law

4.1 The Constitution

The Constitution contains various provisions, especially in the Bill of Rights, that protect the freedom of South Africans to determine their own destinies. This can be summed up in the notion of freedom of choice, or freedom of enterprise.

The most important provision underlying all of the other provisions is found in section 1 of the Constitution – the Founding Provisions. Section 1(a) provides that South Africa is founded on "[h]uman dignity, the achievement of equality and the advancement of human rights **and freedoms**" (our emphasis). This provision permeates all the provisions of the Bill of Rights by virtue of being a founding value.

Other provisions relevant to freedom of choice include the following:

- Section 7(1) provides that the Bill of Rights "enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and **freedom**" (our emphasis). Section 9(2) provides that the right to equality "includes the full and equal enjoyment of **all rights and freedoms**" (our emphasis).
- Section 10 provides that "[e]veryone has inherent dignity and the right to have their dignity respected and protected". According to the Department of Justice and Correctional Services, this means that "[n]o person should be perceived or treated merely as instruments or objects of the will of others. Every person is entitled to equal concern and to equal respect".[3]
- Section 12(1)(a) provides that everyone has the right "not to be deprived of freedom arbitrarily or without **just** cause" and section 12(1)(c) guarantees the right of everyone "to be free from all forms of violence from **either public or private sources**" (our emphasis).
- Section 13 prohibits "slavery, servitude or forced labour", the converse of which will also be true: forced unemployment or labour disassociation.
- Section 14 guarantees the right to privacy, meaning private affairs should not be interfered with or monitored without consent.
- Section 18 provides that "[e]veryone has the right to freedom of association". This right means that natural or juristic persons may associate or disassociate with whomever they wish and cannot be forced by law or other coercive means to associate or disassociate.
- Section 22 provides that all citizens have "the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law". The language of the provision is clear, in that the *practice*, but not the *choice*, of profession may be *regulated,* but not *prohibited*. To read prohibition into regulation would make the entirety of the provision and the 'right' redundant. No provision in the Constitution may be construed as being redundant or inconsequential.

Section 25 guarantees the right of everyone to be secure in their property unless the property is expropriated for a public purpose or in the public interest with compensation. No expropriation may be arbitrary. Expropriation of property can affect any entitlement of ownership, meaning that regulating away someone's ability to decide what to do with their property – without the property vesting in someone else – would qualify as expropriation.

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[3] http://www.justice.gov.za/brochure/2014_ConstitutionRights.pdf/.

Chapter 2 of the Constitution – the Bill of Rights – does not 'create' rights, but merely protects pre-existing rights from infringement. Section 7(1) states that the Bill of Rights "enshrines" the rights, not creates them. Enshrining something, in the constitutional sense, means to place that thing somewhere where it is protected, in this case, in a constitution.[4] South Africans have rights outside of the Constitution, and if a provision in the Bill of Rights is repealed, that does not mean South Africans 'lose' that right. If this were the case, there would be little use in referring to rights as 'human' rights, as section 1 and the Preamble of the Constitution do. South Africans are all rights-bearing entities because we are humans with dignity and individuality, not because government has 'given' us those rights.

The rights in the Bill of Rights can be limited by operation of section 36, but the basic essence of the right in question must remain. Indeed, if protection for human rights is removed from the Constitution or otherwise perverted through legislative 'limitation', South Africa's constitutional project will be severely undermined in that the highest law will continue to recognise the rights in question, but will not adequately protect them. This is not a situation South Africans would want to find themselves in. By implying that government can extinguish rights simply by enacting legislation dressed in the garb of 'protecting' the people while undermining their freedom, the impression is created that rights are an idea owned by the State, and not the people. This would be faulty both according to human rights theory, but also according to the logic of the Constitution itself.

4.2 The Rule of Law

Section 1(c) of the Constitution provides that South Africa is founded upon the supremacy of the Constitution and the Rule of Law. Section 2 provides that any law or conduct that does not accord with this reality is invalid. This co-equal supremacy between the text of the Constitution and the doctrine of the Rule of Law remains underemphasised in South African jurisprudence, but it is important to note for the purposes of this submission.

One of the Constitutional Court's most comprehensive descriptions of what the Rule of Law means was in the case of *Van der Walt v Metcash Trading Ltd*. In that case, Madala J said the following:

> "[65] The doctrine of the rule of law is a fundamental postulate of our constitutional structure. This is not only explicitly stated in section 1 of the Constitution but it permeates the entire Constitution. The rule of law has as some of its basic tenets:
>
> > 1. the absence of arbitrary power – which encompasses the view that no person in authority enjoys wide unlimited discretionary or arbitrary powers;
> >
> > 2. equality before the law – which means that every person, whatever his/her station in life is subject to the ordinary law and jurisdiction of the ordinary courts.
> >
> > 3. the legal protection of certain basic human rights.
>
> [66] The concept of the rule of law has no fixed connotation but its broad sweep and emphasis is on the absence of arbitrary power. In the Indian context Justice Bhagwati stated that:
>
> > 'the rule of law excludes arbitrariness and unreasonableness.'
>
> I would also add that it excludes unpredictability. In the present case that unpredictability shows clearly in the fact that different outcomes resulted from an equal application of the law."[5]

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4 https://dictionary.cambridge.org/dictionary/english/enshrine.

5 *Van der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC) at paras 65-66. Citations omitted.

The Rule of Law thus:

- Permeates the entire Constitution.
- Prohibits unlimited arbitrary or discretionary powers.
- Requires equality before the law.
- Excludes arbitrariness and unreasonableness.
- Excludes unpredictability.

The Good Law Project's *Principles of Good Law* report largely echoed this, saying:

> "The rule of law requires that laws should be certain, ascertainable in advance, predictable, unambiguous, not retrospective, not subject to constant change, and applied equally without unjustified differentiation."[6]

The report also identifies four threats to the Rule of Law,[7] the most relevant of which, for purposes of this submission, is the following:

> "[The Rule of Law is threatened] when laws are such that it is impossible to comply with them, and so are applied by **arbitrary discretion** […]"

Friedrich August von Hayek wrote:

> "The ultimate legislator can never limit his own powers by law, because he can always abrogate any law he has made. The rule of law is therefore not a rule of the law, but a rule concerning what the law ought to be, a meta-legal doctrine or a political ideal." [8]

What is profound in Von Hayek's quote is that he points out that *the* Rule of Law is not the same as *a* rule of *the* law. Indeed, any new Act of Parliament or municipal by-law creates and repeals multiple 'rules of law' on a regular basis – expropriation without compensation would be an example of 'a' rule of 'the' law. The Rule of Law is a doctrine, which, as the Constitutional Court implied in *Van der Walt*, permeates all law, including the Constitution itself.

Albert Venn Dicey, known for his *Introduction to the Study of the Law of the Constitution*, and considered a father of the concept of the Rule of Law, wrote that the Rule of Law is "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".[9]

Dicey writes "the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint".[10] He continues, saying the Rule of Law 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 of wide discretionary authority on the part of the government".[11]

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6 Good Law Project. *Principles of Good Law.* (2015). 14.
7 Good Law Project 29.
8 Von Hayek FA. *The Constitution of Liberty.* (1960). 206.
9 Dicey AV. *Introduction to the Study of the Law of the Constitution.* (1959, 10th edition). 202-203.
10 Dicey 184.
11 Dicey 198.

The opposition to arbitrary power should not be construed as opposition to discretion in and of itself. Officials use discretion to determine which rules to apply to which situation, and thus some discretionary power is a natural consequence of any system of legal rules. However, the discretion must be exercised per criteria which accord with the principles of the Rule of Law, and the decision itself must also accord with those principles.

A common example of arbitrary discretion is when a statute or regulation empowers an official to make a decision "in the public interest". What is and what is not "in the public interest" is a topic of much debate, and empowering officials to apply the force of law in such a manner bestows upon them near-absolute room for arbitrariness. The "public interest", however, can be one criterion among other, more specific and unambiguous criteria.

The fact that some discretion should be allowed is a truism; however, the principle that officials may not make decisions of a substantive nature still applies. Any decision by an official must be of an enforcement nature, i.e. they must do what the legislation *substantively* requires. For instance, an official cannot impose a sectoral minimum wage. The determination of a minimum wage is properly a legislative responsibility because it is of a substantive nature rather than mere enforcement. Unfortunately, the Basic Conditions of Employment Act gives the Minister of Labour the authority to make "sectoral determinations" – which includes determining a minimum wage – which is a clear violation of the Rule of Law and the separation of powers.[12]

4.3 The imperative of impact assessments

The most important tenet of the Rule of Law is its prohibition on arbitrariness. Arbitrariness is not only a symptom of unfair and bad governance, but is also very harmful to the economy, as it leads to uncertainty and means people and businesses cannot plan their affairs ahead of time.

The opposite of arbitrariness is reasonableness. Reasonableness consists of two elements, namely, rationality and proportionality. Proportionality means that there must not be an imbalance between the adverse consequences of a policy and the beneficial consequences.[13] Rationality means that evidence must support the policy. Stated differently, there must be a rational connection between the purpose of the policy and the solutions proposed.[14] It has also been said that a third element, effectiveness, is a part of reasonableness.

It stands to reason that the requirement of rationality, read together with section 195(1)(g) of the Constitution, which states the principles according to which the public administration must function, 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.

To determine whether a policy will have the consequence intended by the enacting authority, a study must be done as a matter of course, and must be 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, and if a study is not released to the public, government is failing to comply with section 195(1)(g), and thus, the process is unconstitutional. These studies are known as socio-economic impact assessments (SEIAs).

Without published 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, they must know how the decision was arrived at and on what basis, and their participation must be meaningful (in other words, government must

12 Section 51 of the Basic Conditions of Employment Act (75 of 1997).
13 Hoexter C. *Administrative Law in South Africa*. (2012). 344.
14 Hoexter 340.

engage in good faith) and not merely a façade. Without a SEIA, the public cannot participate in the policy-making and law-making processes as mandated by the Constitution.

In *Principles of Good Law*, the Good Law Project writes:[15]

> "Although widely divergent, all the international assessment models amount ultimately to institutionalised procedures for determining the need for a law and its expected benefits. They are also concerned with the cost to government of implementation, as well as the capacity of government to police and enforce the law and the cost to the public of compliance. Other aspects considered are the economic and other likely impacts, the prospect of unexpected or unintended consequences; and the behaviour modifications likely to be promoted by the law and distortions that might flow from them."

It goes on to describe what a SEIA would encompass:[16]

> "2. Socio Economic Impact Assessment (SEIA). Multi-faceted analysis *and quantification* of:
>
> 2.1 The purposes of laws – precisely what "mischief" they are addressing;
>
> 2.2 Desired consequences;
>
> 2.3 Estimated secondary and unintended effects, including impacts on the economy or society in general;
>
> 2.4 Feasibility and efficacy – prospects in practice of the law being observed, and if not, enforced by officialdom, police and the courts;
>
> 2.5 Costs and benefits – accurate and comprehensive estimates of costs of administration and implementation, enforcement and policing, compliance and avoidance/evasion/resistance;
>
> 2.6 Inter-departmental considerations – the extent to which other departments are implicated;
>
> 2.7 Administration and budget – advance provision for all budgetary, staffing, training and related needs; diversion or dilution of resources and capacity."

The Department of Planning, Monitoring and Evaluations' (DPME) SEIA System (SEIAS) guidelines describe the purpose of SEIA as follows:[17]

> "3. The role of SEIAS
>
> SEIAS aims:
>
> - To minimise unintended consequences from policy initiatives, regulations and legislation, including unnecessary costs from implementation and compliance as well as from unanticipated outcomes.
> - To anticipate implementation risks and encourage measures to mitigate them."

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15 Good Law Project 34.

16 Good Law Project 35.

17 Department of Planning, Monitoring and Evaluation. "Socio-Economic Impact Assessment System (SEIAS): Guidelines." (2015). 4.

The DPME regards a SEIA as more than a mere cost-benefit analysis. SEIAs, instead, must contribute to improving policy, rather than measuring their net value. It must, furthermore, "help decision makers to understand and balance" the impact of policy on different groups within society.[18]

That regulations or legislation can lead to unintended consequences is acknowledged by government. They could occur because of inefficiency, excessive compliance costs, overestimation of the benefits associated with the regulation, or an underestimation of the risks involved with following through with the regulation.[19]

The SEIA System applies to legislation and regulations, as well as policy proposals.[20]

5. Conclusion

The Climate Change Bill was the subject of inadequate public participation given the contemporary reality of South Africa's political discourse with an intense focus on expropriation without compensation. The Bill itself is furthermore flawed in that it assigns too wide discretionary and law-making powers to the executive government without containing any strict legal criteria in terms of which those powers must be exercised. The notion of carbon budgets also poses a threat to personal liberty and economic development while itself simultaneously suffering from too wide discretionary and law-making powers.

The FMF recommends the Bill be withdrawn, the concerns addressed, and, if it is reintroduced, be subjected to rigorous and focused public participation.

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18 DPME 7.
19 DPME 4.
20 DPME 8.