

*Ulawulo Lomthetho/Ngokomthetho*  
*Puso ya Molao*  
*Oppegesag van die Reg*



**November 2018**

**SUBMISSION TO THE  
DEPARTMENT OF TRANSPORT  
ON THE  
ECONOMIC REGULATION OF TRANSPORT BILL, 2018**

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## 1. Free Market Foundation and Rule of Law Project

The Free Market Foundation (FMF)<sup>1</sup> 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<sup>2</sup> 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 24 October 2018, the Department of Transport published the revised draft Economic Regulation of Transport Bill, 2018.<sup>3</sup> The Bill seeks *inter alia* to “consolidate the economic regulation of transport within a single framework and policy”.

The FMF is concerned that this Bill serves no other purpose than to add extra layers of bureaucracy and red tape to the transportation industry, during a time when South Africa is experiencing near-zero economic growth. Section 3(1)(a) of the Bill states that the Bill seeks to “promote the development of a competitive, efficient and viable South African transport industry contributing to economic growth and development”. While this goal is laudable, the provisions in the Bill directly contradict it, by creating a new regime of price fixing and of red tape. Instead of more regulations, it would be more appropriate for government to repeal existing regulations so as to allow new entrants to the market to do so free from compliance with onerous legal requirements.

As a result, the FMF proposes that the Bill as a whole be abandoned. If that is not possible, any mention or reference to price control must be excised from the Bill. Lastly, the deficiencies in the legality of the Bill (mostly relating to the Rule of Law) must as an imperative, not as a preference, be removed.

## 3. The folly of price controls<sup>4</sup>

The market is dynamic, constantly balancing the supply of and the demand for products through a spontaneous price mechanism. Can a price regulator react timeously to changes in the market and deliver true benefit to the people?

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<sup>1</sup> [www.freemarketfoundation.com](http://www.freemarketfoundation.com).

<sup>2</sup> [www.ruleoflaw.org.za](http://www.ruleoflaw.org.za).

<sup>3</sup> *Government Gazette* No. 41992.

<sup>4</sup> This section is based largely on the work of Eustace Davie and Jasson Urbach, directors at the FMF. See: <http://www.freemarketfoundation.com/article-view/time-to-reconsider-the-command-and-control-strategy>, <http://www.freemarketfoundation.com/article-view/price-controls-reduce-access-to-medicines>, <http://www.freemarketfoundation.com/article-view/government-should-not-fix>

Attempts to change or 'improve' outcomes by intervening in the economy for political reasons will almost without fail have negative consequences. The reason is that 'the economy' or 'the market' consists of the sum of the activities of the entire population, all attempting to maximise their welfare. In using a mechanism such as price control, government tries to prevent consumers from freely exercising their choices, and simultaneously, to take over the functions normally performed by supply and demand in the market-place.

In their book, *Free to Choose*, Milton and Rose Friedman described why price controls have negative consequences. "Economists may not know much. But we know one thing very well: how to produce surpluses and shortages. Do you want a surplus? Have the government legislate a minimum price that is above the price that would otherwise prevail", they wrote. "Do you want a shortage? Have the government legislate a maximum price that is below the price that would otherwise prevail."

Any fixing of prices in the transportation sector will have the same consequences predicted by the Friedmans, except, since this is a service industry, it is more likely for businesses to either consolidate into a small number of very big companies, or simply close down.

When a regulator, in this case government, is put in control, prices are set only after a protracted research and consideration period, and, once set, a fixed price cannot quickly or spontaneously adjust for changing market circumstances. Benchmark pricing attempts to determine 'acceptable' transport prices by deriving them from average prices for the same products in other countries. While this mechanism may appear to have economic legitimacy, it causes distortions because it is incapable of capturing or simulating all the factors that determine competitive market prices. Price controls therefore distort the pricing mechanism and interrupt the dynamic demand and supply process. History has demonstrated that without market prices, information on relative scarcities cannot circulate and provide the right incentives.

Price setting by government is unavoidably arbitrary, will always have unintended consequences, and cannot be carried out without causing some form of harm.

An American soldier was shot dead in Iraq several years ago while guarding a queue of angry Iraqis waiting in line to buy price-controlled petrol at a government-owned filling station. Had there been competing private petrol stations and no government-set maximum price the tragedy would not have occurred. Prices would have adjusted to a level at which supplies met demand without causing queues of frustrated customers. Similar queues formed when the American government tried to keep petrol prices artificially low during the 1970s. As soon as the price controls were removed, and the price was allowed to increase to its real market level, the queues disappeared. The artificially low price encouraged higher consumption and reduced supply. Logic, or the laws of economics if you will, tell us that was inevitable.

In South Africa, like in most other countries, it is the people who live in large urban areas who have access to the high-volume-low-mark-up retailers able to offer cheaper goods. South Africa's poor generally are restricted to having to shop in low-volume-high-mark-up establishments in the townships and rural areas. Price controls invariably penalise low volume establishments and, potentially, are the cause for many of them to close down.

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[medicine-prices, http://www.freemarketfoundation.com/article-view/respect-the-constitution-and-apply-economics-in-the-pricing-of-medicines.](http://www.freemarketfoundation.com/article-view/respect-the-constitution-and-apply-economics-in-the-pricing-of-medicines)

One of many unwelcome consequences of price controls is that they act as a barrier to entry. Large established businesses will often tolerate or even welcome regulated price controls because they keep competition out of the industry. When prices are regulated so that they are kept low and very little profit is allowed to be made, low-volume-high-mark-up shops, or entrepreneurs trying to enter the market, cannot afford to buy stock from which they will not make a return sufficient to support the normal day-to-day running of their business. High-volume-low-mark-up retailers in large urban areas will be able to do this.

The Pharaohs of ancient Egypt instituted price controls on wheat, ostensibly to prevent a famine. In doing so, they disrupted production and supply and induced a famine that eventually ended their reign. Similarly, the Roman emperor Diocletian instituted stringent price controls in an effort to correct the consequences of earlier price controls on wheat and other goods dating back to the fourth century BC, a situation he exacerbated by debasing the currency. He imposed the death penalty on anyone contravening the controls or withholding goods from the market.

One historian described the result: “the people brought provisions no more to market, since they could not get a reasonable price for them, and this increased the dearth so much that [...] the law itself was set aside.”

Diocletian paid a price for attempting to buck the laws of economics – he was forced from the throne after just four years. Prices freely formed in a market that has no regulatory barriers to entry or disincentives to production and distribution are essential signals that guide suppliers as to what is in greatest demand and where they must concentrate their productive effort. Remove those essential signals by fixing prices by regulation and the entire information process is destroyed. It is imperative that market prices be left alone.

Perhaps without realising it, government admits to the fact that price controls are a bad idea in section 10(1) of the Bill, which states:

“At any time after a price control takes effect, the Regulator may conduct an extraordinary review if the Regulator is satisfied that reasonably unforeseeable changes in economic demand, input costs, technology, the regulatory environment or other similar factors have affected the regulated entity sufficiently to constitute a threat to its economic sustainability during the current price control period and thus justify an early review of the price control.”

Price controls always bring unintended, mostly detrimental, changes in economic circumstances. While larger businesses might not have their economic sustainability threatened, it is inappropriate to expect small and medium enterprises to react similarly.

## **4. 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."<sup>5</sup>

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."<sup>6</sup>

The report also identifies four threats to the Rule of Law, 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** [...]"<sup>7</sup>

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<sup>5</sup> *Van der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC). At paras 65-66. Citations omitted.

<sup>6</sup> Good Law Project. *Principles of Good Law*. (2015). 14.

<sup>7</sup> Good Law Project (footnote 6 above) 29.

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.”<sup>8</sup>

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. 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”.<sup>9</sup>

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”.<sup>10</sup> 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”.<sup>11</sup>

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, for example, 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

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<sup>8</sup> Von Hayek FA. *The Constitution of Liberty*. (1960). 206.

<sup>9</sup> Dicey AV. *Introduction to the Study of the Law of the Constitution*. (1959, 10<sup>th</sup> edition). 202-203.

<sup>10</sup> Dicey (footnote **Error! Bookmark not defined.** above) 184.

<sup>11</sup> Dicey (footnote **Error! Bookmark not defined.** above) 198.

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.<sup>12</sup>

When applied to the Economic Regulation of Transport Bill, there are various provisions which assign discretionary power to officials without those powers being constrained by criteria in the legislation itself. This opens the door to arbitrariness.

Other provisions contained fundamentally extra-legal characteristics, such as section 4(3) which provides that, “The extent of regulation introduced must be proportionate to the competition problems in the market.” Such a provision is inappropriate for legislation, as no regulator, and certainly no court, has the requisite expertise to determine whether a given regulation is “proportionate” to the “competition problems” in the market. In fact, it is doubtful whether such a determination can be made by anyone. In the final analysis it amounts to a matter of opinion, which is difficult to review in court, and, as such, is a threat to the Rule of Law.

## **5. Conclusion**

The Economic Regulation of Transport Bill is fundamentally at odds with economic reality and with the legal-constitutional paradigm in South Africa. Price controls, which are the main feature of the Bill, are detrimental to a healthy economy and will at all times lead to distortions of market forces and incentives. The FMF enjoins government to abandon the Bill and to instead remove regulations within the transportation industry so as to encourage and incentivise free enterprise and economic growth.

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<sup>12</sup> Section 51 of the Basic Conditions of Employment Act (75 of 1997).