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RULE OF LAW PROJECT
FREE MARKET FOUNDATION

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SUBMISSION TO THE COMMITTEE ON SPORTS, ARTS AND CULTURE ON THE NATIONAL SPORT AND RECREATION AMENDMENT BILL, 2020

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Executive summary

There are three broad issues underlying the proposed National Sport and Recreation Amendment Bill, 2020, that the Free Market Foundation regards as problematic.

The first is that the Bill unnecessarily and unjustifiably intrudes on the private sphere, by expanding the extent and potential scope of government interference in sport and recreational activities. The second is that the Bill, like many other pieces of legislation enacted by Parliament, vests executive officials, primarily the Minister of Sport and Recreation, with discretionary powers that are not restrained by any guiding criteria on how the Minister must exercise those powers. Thirdly, the Bill is clearly aimed at centralising governmental power away from civil society and away from independent institutions, in the hands of the Department of Sport and Recreation and its minister.

It is also noteworthy that a socio-economic impact assessment did not accompany the Bill, despite it being government policy that all new interventions must go through such a process.

All South Africans are by right entitled to a free sphere of private action. Two of the most quintessentially private affairs are sport and recreation. However, the Bill would, among other things, vest the statutory Sports Confederation with the power to "coordinate" all "high-performance sport", allow the Minister to impose policy and political considerations on private sporting bodies, require coaches and gyms to be licenced, registered, and paying subscription fees, and disallow sporting bodies to bid for or host sport and recreational events without ministerial approval. One particularly concerning aspect is the reintroduction of conscription in South Africa, this time for sport. The Bill, if passed, would require sportspersons who have been called to serve South Africa in an international event to comply, without regard to their own choices. The inclusion of "recreation" specifically in many of these intrusions creates the impression that government wants to needlessly start regulating what South Africans do for fun, and this must not be allowed.

This interference in sporting affairs also stands to embarrass South Africa in the international sporting arena, as various international sporting codes prohibit such direct government interference in the operations and decisions of sporting bodies.

The imperative of the Rule of Law contained in section 1(c) of the Constitution prohibits Parliament from assigning unrestrained discretionary powers to the executive in the legislation it enacts. Yet this appears throughout the Bill, with provisions empowering the Minister to do certain things, appoint certain functionaries, and direct certain people to do things, all based on the Minister's own whims, without any of these decisions being restrained by legal principles or criteria. Certain vague provisions in the Bill, because of their lack of clarity, also lend themselves to being applied in any way the Minister may see fit. In other words, the quality of legislative drafting as regards this Bill leaves much to be desired.

Finally, the Bill is evidently giving effect to an unacceptable centralisationist agenda, which is incompatible with the spirit and values of the Constitution and constitutionalism in general. The Sports Confederation in many respects is made entirely subservient to the Minister, who may, also without restraining criteria, suspend or withdraw recognition and other support for the confederation if the confederation, even for valid reasons, refuses to comply with ministerial diktat. The Bill also establishes a so-called "independent" tribunal to hear disputes in the sporting world, but that tribunal,

too, is entirely subservient to the Minister, as each member is appointed by the Minister. Centralisation of power is exactly what constitutionalism and the Rule of Law is meant to counter, and as such the Bill stands in stark contrast to South Africa's constitutional project.

Our rights and freedoms are protected by the Constitution, which sets out the extent to which government may interfere in our private and associational affairs. Although there is a limitation provision in section 36 that permits the limiting of certain rights, such limitations must be extensively justified. If government wishes for South Africa to avoid being embarrassed in the international sporting arena for violating international codes, and instead respect the imperatives of the Rule of Law and the freedoms guaranteed by the Bill of Rights, the Bill needs to be scrapped in its entirety.

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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[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.

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

1. Introduction

The Constitution of the Republic of South Africa, 1996,[3] particularly by way of the Bill of Rights, secures for all South Africans a sphere of freedom in which unwanted third parties, particularly government, may not intrude. We may express ourselves in certain ways without interference, we may own and keep property without interference, we may choose our own occupations, religions, have our own opinions and beliefs, and may decide how we live harmoniously with our fellows. These liberties may be limited, by application of section 36(1) of the Constitution, but the justification for such limitation is strict and methodological.

The proposed National Sport and Recreation Amendment Bill, 2020, represents a grave infringement on South Africans' guaranteed sphere of freedom, and no cogent justification is made for such an infringement either in the Bill itself or in its accompanying memorandum. The right to freedom of association, contained in section 18, is the biggest victim of the Bill. The regulation of sport by government is inappropriate. This is because sport is a quintessentially private affair that is usually related to recreation and entertainment. Government, by both its history and nature, has no legitimate role to play in either of these aspects of human society.

Freedom of association, as contemplated in section 18, is framed in an unqualified fashion, and forms part of the fundamental constitutional value of freedom laid out in section 1 of the Constitution. It must, as a result, be regarded as one of the special rights, alongside the equally unqualified right to life, that must take precedence over other considerations.

It is absurd that permission from government would now be required in many aspects of sport and recreational activities, like coaching, hosting events, organising a voluntary club, and participating in the sport itself. Sport is nothing more than groups of individuals engaged in exercise and competition for their own enjoyment and the enjoyment of others.

The Bill and the principal (National Sport and Recreation) Act fit the textbook definition of unnecessary legislation, which seeks to regulate behaviour that does not result in any legal harm or mischief. Sport must still be, and is, subject to the ordinary law of contract, and the businesses and associations involved in sport are already governed by company law. If any harm were to come to individuals in the context of sport and recreation beyond the scope of mere sports-related injuries, the common law already makes ample provision for both delictual and criminal legal action to be taken againstguilty parties. Additional legislation specifically for sports clubs and societies serves no general interest.

Countries that are successful in sport do not have blanket legislation that centralise all sporting activities under the authority of a government functionary. In the United States, which enjoys a consistently high success rates in Olympic sporting codes, for instance, there is no sport legislation at either the federal or state levels. Rather, there is an allowance for leagues and unions to regulate themselves, giving these organisations much latitude. This approach has resulted in great success, both commercially and in terms of competitive results.

[3] Hereinafter "the Constitution".

If government wishes for South Africa to avoid being embarrassed in the international sporting arena for violating international regulations and failing to learn from its own history of interfering (and suppressing freedom) in sport for political gain, the Bill needs to be scrapped.

2. Sport and Recreation Amendment Bill – Flaws and concerns

Much of what is said hereunder relies on the background and theory enunciated under the headings that follow from heading 3 onward. We recommend that the reader familiarise themselves with that background and theory first, although that would not be necessary for readers who already have a basic conceptual understanding of constitutionalism and the Rule of Law.

2.1 Clause 1(e): Recreational activity

Incorporating the notion of a "reactional activity" in the Bill, via clause 1(e), is problematic, and will permeate the other concerns in the Bill identified below. This term is defined as including all sport, including *leisure* sport – the activities that people get up to informally and in their own time. To bring such an innocuous, private activity under State regulation is offensive to various values and rights in the Constitution, including sections 12, 13, 14, 18, and 25 in the Bill of Rights, not to mention the notions of constitutionalism, the Rule of Law, and rights themselves.

It is recommended that the notion of recreation be removed from the Bill entirely, to ensure that no informal and casual private activities fall under State regulation.

2.2 Clause 2(a): Sports Confederation to consult Minister

Clause 2(a) of the Bill provides that the Sports Confederation must consult with the Minister when it develops guidelines for the promotion and development of high-performance sport. This is concerning because it makes no sense for government, especially at the ministerial level, to become so involved in sport activities that it must be consulted so rigorously, when there is no legal mischief or harm that needs addressing.

Giving the Minister this much control over the sport sector in South Africa offends the Rule of Law in that it concentrates power unduly and without the necessary guiding criteria for when and how they may exercise that power. Furthermore, it has the foreseeable consequence that politics, rather than considerations relevant to sport, will become a determining factor in sporting affairs.

It is recommended that consultation with the Minister in the development and promotion of high-performance sport not be required.

2.3 Clause 2(b): Coordination of all high-performance sport and recognition of Sports Confederation, etc.

Clause 2(b) requires the Sports Confederation, a statutory body, to coordinate all high-performance sporting activities in South Africa. It is unclear why it is necessary for this to be the case. Sporting in general is a private matter to be enjoyed by the people amongst themselves. To have government-sponsored bodies "coordinating" it contains the seeds of politicisation and disruption to what could otherwise be a unifying and joyful activity.

But apart from the concerns over intruding on the private domain, this is also concerning as a matter of centralisation. Rather than having various sporting bodies coordinating various aspects, regions, etc., of sports, this concentrates all authority over high-performance sports in the Sports Confederation. This offends the constitutional notion that power must be dispersed and not concentrated, in order to avoid abuses and corruption.

It is recommended that the notion of the Sports Confederation coordinating all high-performance sport in South Africa be removed from this clause.

Clause 2(b) also empowers the Minister to suspend or withdraw the recognition of the Sports Confederation, or withdraw its funding, when the confederation and the Minister disagree. This power of the Minister is wholly unrestrained, but for the requirement that there be a notification of the Minister's decision, and a comment period. For this provision to pass constitutional muster, the Minister's power must be more heavily circumscribed. For instance, the Minister must only be allowed to make such a decision if they are convinced that the Sports Confederation has engaged in financial maladministration or engaged in criminal activity. As it stands, no such restraint exists, and the Minister may take this drastic action for any reason if the Sports Confederation (for what might be valid reasons) does not comply with ministerial instructions.

It is recommended that substantive criteria be introduced into the clause to constrain how and under what circumstances the Minister may exercise this power.

Clause 2(b) requires the Sports Confederation to comply with ministerial policy on "equity, representivity and redress in sport and recreation". While equity and redress are national and constitutional imperatives, we must remember that sport is a fundamentally private, social, commercial, and entertainment activity. It is not a quintessential government activity.

Above all, however, it is unclear how equity, representivity, and redress are to be promoted in *recreation*. Will there be a redistribution of playtime at daycare facilities between children along racial and gender lines? Will public sports facilities only allow people of certain races and genders to use them in proportion to their representation in the national demography?

The infiltration of political considerations of this nature into the essentially private activity of sport should be discouraged, but above all, it must be kept away from recreation and leisure activity at all costs.

It is recommended that this aspect of this clause be qualified. It must be specified how the Sports Confederation must in its activities promote equity, representivity, and redress, without allowing the Minister themselves to decide this in policy dictates. It is further recommended that equity, representivity, and redress, play no part in any consideration of recreation.

Clause 2(b), furthermore, introduces stringent regulation for the coaching profession, requiring anyone who wishes to "train or guide athletes or participants preparing in **any** sport" (our emphasis) to be licensed and comply with ministerial regulations. "Any sport" includes informal and casual sporting and sporting at schools, including independent schools. This centralisation of power and concomitant reduction in private freedom is deeply concerning.

It is recommended that the new requirements for coaches be removed from the Bill.

2.4 Clause 3: Imposing policy considerations on sporting bodies

Clause 3 presents a clear violation of the freedom of association guaranteed by the Constitution in section 18. It bestows on the Minister the power to impose policy directives and objectives on the Sports Confederation as well as various sporting bodies, which today operate independently.

The Bill's provisions seriously transgress certain aspects of the International Olympic Committee Charter. The Charter is very clear about governmental interference in the sporting codes of its members. The Charter *inter alia* provides:

> "**Fundamental Principles of Olympism**
>
> …
>
> 5. Recognising that sport occurs within the framework of society, sports organisations within the Olympic Movement shall have the rights and obligations of autonomy, which include freely… determining the structure and governance of their organisations, enjoying the right of elections free from any outside influence…
>
> …
>
> **Mission and role of the [National Olympic Committees, NOCs]**
>
> …
>
> 5. In order to fulfil their mission, the NOCs may cooperate with governmental bodies, with which they shall achieve harmonious relations. However, they shall not associate themselves with any activity which would be in contravention with the Olympic Charter. The NOCs may also cooperate with non-governmental bodies.
>
> 6. The NOCs must preserve their autonomy and resist all pressure of any kind, including but not limited to political, legal, religious or economic pressures which may prevent them from complying with the Olympic Charter.
>
> …
>
> 9. … the IOC Executive Board may take any appropriate decisions for the protection of the Olympic Movement in the country of an NOC, including suspension of or withdrawal of recognition from such NOC if…any act by any governmental or other body causes the activity of the NOC or the making or expression of its will to be hampered…
>
> …
>
> **Composition of the NOCs**
>
> 4. Governments or other public authorities shall not designate any members of an NOC. However, an NOC may decide, at its discretion, to elect as members representatives of such authorities.
>
> …"[4]

Outside of the clear contravention of these provisions of the Charter, the blatant State interreference into what should be independent sporting bodies is heavily frowned upon by sport federations like FIFA. FIFA has banned Kuwait, for instance, for interfering in the sporting activities of members. We should take this example as a warning and refuse to pass the Bill into law.

FIFA's ban on the Kuwait football fraternity was predicated on a breach of the following provisions[5] of the FIFA Statutes in force at that time:

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4 https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf

5 https://www.lawinsport.com/topics/regulation-a-governance/item/governmental-interference-in-global-sport-why-kuwait-is-still-in-the-olympic-wilderness

"**14. Member associations' obligations**

1. Member associations have the following obligations:

…

i) To manage their affairs independently and ensure that their own affairs are not influenced by any third parties;

…

19. Independence of member associations and their bodies

1. Each member association shall manage its affairs independently and without undue influence from third parties.

2. A member association's bodies shall be either elected or appointed in that association. A member association's statutes shall provide for a democratic procedure that guarantees the complete independence of the election or appointment.

3. Any member association's bodies that have not been elected or appointed in compliance with the provisions of par. 2, even on an interim basis, shall not be recognised by FIFA.

4. Decisions passed by bodies that have not been elected or appointed in compliance with par. 2 shall not be recognised by FIFA."[6]

The Kuwait intervention was not dissimilar from that contemplated by government in the Sport and Recreation Amendment Bill.[7]

South Africa could also run into problems when trying out for the Paralympics, for the same reasons.

Clauses 2(a) and 3 of the Bill are the worst offenders, as they will give the executive direct control and influence over sporting federations, including organisations like the South African Sports Confederation and Olympic Committee (SASCOC) and the South African Football Association (SAFA) which are governed by the aforementioned international bodies.

It is recommended that any provision in the Bill that allows, or might be construed as allowing, or by implication allows, government to impose any policy considerations or decisions not explicitly required by the Constitution, on sporting bodies, be removed from the Bill.

2.5 Clause 4(b): Sport conscription, crimes against private bodies, supporting government priorities

Clause 4(b) is intensely problematic for a variety of reasons. It re-introduces conscription in South Africa by requiring that "selected players comply with any national call to participate in a sport". This clause is an unconscionable violation of the constitutional prohibition on slavery and forced servitude found in section 13. More than that, the clause requires (private) sport and recreation bodies to administer it.

Clause 4(b), furthermore, makes it a criminal offence for sportspersons to fail to comply with rules and regulations imposed by international sport bodies. Such failure could land them in jail for up to two

[6] https://resources.fifa.com/image/upload/fifa-statutes-5-august-2019-en.pdf?cloudid=ggyamhxxv8jrdfbekrrm

[7] Arbitration CAS 2015/A/4282 Kuwait Karate Federation (KKF), Kuwait Shooting Federation (KSF) & Khaled Jassim Mohammad Almudhaf v International Olympic Committee (IOC) (2017). https://jurisprudence.tas-cas.org/Shared%20Documents/4282.pdf

years. International sport bodies are private organisations. This part of clause 4(b), too, requires private sport and recreation bodies to administer it. The clause gives unacceptable governmental power to private bodies that lack democratic legitimacy. At best, it makes sense for noncompliant sportspersons to be disqualified or banned from participating in these bodies' events, but to make them liable for a fine or imprisonment is unacceptable in a free and democratic South Africa.

Clause 4(b), furthermore, requires sport and recreation bodies to notify the Minister of their intention to do various things involving international sport. There is no apparent legal harm or mischief present that needs to be solved through this intervention. There is no rational reason to require private bodies, engaged with other, international, private bodies, to notify the South African government of anything in this respect.

Finally, clause 4(b) requires private sport and recreation bodies to "comply with and support […] key government priorities", including the "promotion of nation building and social cohesion" and "promotion of national symbols and heritage". This clause, among the others, breathes politics into an activity where it is most unwelcome.

It is recommended that all the above-mentioned aspects of clause 4(b) be removed from the Bill in their entirety.

2.6 Clause 4(e) and (h): Gatekeeping for South African sportspersons

Clause 4(e) prohibits sport or recreation bodies that wish to participate in "formal and professional" sport, from recruiting foreign sportspersons if there are already "suitable" South Africans available. Clause 4(g) and (h) further regulate this matter, with clause 4(h) particularly prohibiting foreign persons from participating in sport without complying with ministerial diktats. The clause even provides that South Africans who "allow" or "assist" foreigners from participating in sport in South Africa without permission are guilty of a criminal offence.

This is problematic and represents an unjustified infringement on freedom of association as contained in section 18 of the Constitution. Sports clubs often acquire well-known foreign athletes and sports stars to play in their local and international events – this has been a mainstay of sports for quite some time.

It is recommended that this infringement of freedom of association be removed from this clause.

2.7 Clause 4(g): Representing or coaching "his or her country"

Clause 4(g) empowers the Minister to prescribe the manner in which it is determined whether a "recruited foreign sport person has represented or coached his or her country". This is a bewildering clause. Aside from the absolute and unrestrained manner in which this power is formulated – that is, without any guiding criteria – it makes no sense and is therefore vague. The imperatives of the Rule of Law require legal rules and provisions of be clearly formulated, otherwise those bound by the provision cannot know what their duties and obligations are. This clause falls foul of that standard.

It is recommended that this aspect of clause 4(g) be removed from the Bill.

2.8 Clause 5: Recognition of sport and recreation bodies, licencing of agents, monopolisation of sporting codes, etc.

Clause 5 represents a significant interference by the government in the independence of sport and recreation bodies, as it makes their recognition contingent on the unrestrained discretion of the Minister and staff in the Department of Sport and Recreation. The clause requires "sport or recreation agents" to be registered and licensed as prescribed by government. Beside the unrestrained power bestowed on the Minister to prescribe everything and anything related to such registration and licensing without circumscription, this is also undue interference in a private affair.

It is recommended that this aspect of the clause be removed from the Bill.

Clause 5 mandates that there can only be one "sport or recreation body for a particular sport code or recreational activity", in part based on ministerial diktat that contains no criteria. It is worrying that government will now only recognise single institutions that are responsible for *recreational activities*.

This form of interference will lead to South Africa being either suspended or expelled from partaking in international sporting competitions regulated by bodies like FIFA and the IOC.

As can be seen from the Charter above, cooperation between sport bodies and government is encouraged, but there is a strong prohibition of governmental interference in the activities of sport bodies and their financing. The proposed amendments to the National Sport and Recreation Act are, unfortunately, quite brazen violations of these international sporting regulations.

The reason South Africa was banned unilaterally from participating in international sporting events during the racist National Party regime's tenure is because of the very same thing that our government is contemplating doing: Unduly interfering in sport.

It is recommended that this aspect of clause 5 be removed from the Bill. It is, moreover, strongly recommended that if this clause is to remain in the Bill, that any reference whatsoever to "recreational activities" be removed from the clause.

2.9 Clause 6(b): Ministerial regulation of sports facilities

Clause 6(b) empowers the Minister, without guiding or constraining criteria, to formulate "norms and standards for the building of new sports facilities". The preceding provisions in the principal Act refer to facilities that are provided by government. It is unclear whether this proposed clause is empowering the Minister to formulate norms that will apply to the construction of new sports facilities in general, or only to those sponsored by government. This lack of clarity is a material concern.

It is recommended that this provision be reworded to make it explicit that it applies strictly to government-funded, -sponsored, or -provided facilities, rather than all, including private, facilities.

2.10 Clause 7: Compliance orders for private sports facilities

Clause 7 empowers inspectors to issue "compliance orders" to owners of sport *or recreational* facilities. This clause has no guiding or constraining criteria. In other words, inspectors may, for instance, order the private owner of a playground to build an even bigger jungle-gym for the children who play there. This order need not be based on considerations of health and safety, but on any consideration, because of a lack of criteria. Pertinently, the clause says regulations made by the

Minister in this regard must take cognisance of the rights to dignity, freedom and security of the person, and privacy, but excludes the right to property, contained in section 25 of the Constitution.

It is recommended that this aspect of clause 7 be removed from the Bill, and that private owners' right to decide for themselves and their property be respected.

2.11 Clause 10: Bidding for sport and recreational events and fitness industry regulation

Clause 10 inexplicably makes it impossible for private sport bodies to bid for or host international sport or recreational events without the permission of the Minister. Like other provisions throughout the Bill, it is entirely unclear why government be granted such an awesome power of intrusion into affairs that do not concern it. There is no legal mischief or harm in letting a South African sporting body host a sporting event in South Africa without government direction or involvement.

It bears emphasising, again, that *recreational events* are included in this draconian clause. In other words, it need not be a competition or tournament, but might simply be people from around the world getting together to have fun. Such a phenomenon would now be subjected to ministerial control.

The Minister's power to approve or reject such applications for bidding or hosting contains no limiting criteria. They may therefore reject an application for any conceivable reason.

It is recommended that this aspect of clause 10 be removed from the Bill. If this aspect of the clause remains, it is crucial and thus strongly recommended that any reference to recreational events be removed from the clause.

Clause 10 also inserts a new section 11D into the principal Act, which is to regulate the "fitness industry". It grants the Minister, without guiding criteria, an absolute power to establish a new regulatory authority for the fitness industry, which will be completely subject to the Minister's whims and control. The Minister, for instance, appoints all the members of the authority, in a manner the Minister themselves prescribes. This centralises power unjustifiably in the hands of the Minister or their delegate. The clause also requires "fitness professionals" and "fitness establishments" to be licensed, and the Minister has an absolute and unconstrained discretionary power to prescribe how these licences are to be obtained.

It is recommended that this aspect of this clause be removed from the Bill. Alternatively, it is recommended that the provision be reformulated to make the Fitness Industry Regulatory Authority an independent institution, and that the Minister, when appointing members, must at least do so in consultation with the fitness industry. It would be better yet if the fitness industry itself elected the members of the authority.

The Fitness Industry Regulatory Authority, which is not independent and operates at the whim of the Minister, may, according to ministerial diktat, close down fitness establishments or suspend their, or a fitness professional's accreditation, if the establishment or professional is "guilty" of not complying with the legislation or with ministerial regulations. Such regulations may be made arbitrarily by the Minister, without constraining criteria. The authority may also, according to ministerial prescriptions not constrained by any criteria, determine (again, not subject to any criteria) the "subscription fee" that fitness professionals and establishments must pay on an annual basis. The absence of criteria in this regard enables the authority, which acts only at the behest of the Minister, to decide fees

arbitrarily. Such fees might be unduly onerous. Subscription, furthermore, implies a *voluntary* arrangement, yet the clause evidently makes it a requirement for professionals and establishments to be "subscribed" to the authority.

It is recommended that this aspect of clause 10 be removed from the Bill. If it is not removed, it is recommended that substantive criteria be inserted into the clause to guide and constrain both the power of the authority to suspend or withdraw accreditation or registration, or close down establishments; and the power of the Minister to make regulations in this regard.

2.12 Clause 11(b): Investigating compliance with Transformation Charter

Clause 11(b) empowers the Minister to appoint a committee of inquiry that may investigate *inter alia* "any failure to comply with […] the Transformation Charter as endorsed and approved by the Minister". This brings politics into sport, where it is unwelcome.

It is recommended that this aspect of clause 11(b) be removed from the Bill.

2.13 Clause 12: "Independent" tribunal

Clause 12 establishes a so-called "independent Tribunal" that will decide matters and disputes under section 13 of the principal Act. The clause allows the Minister to "participate as a party in **any proceedings** before the Tribunal" (our emphasis), and the Minister may themselves prescribe how they may participate. This is highly improper, as the Minister might in fact not be a party to the proceedings. We are concerned that this is part of the centralisationist agenda that is evident in this amendment bill, to make the Minister relevant in affairs where they are not relevant – in this case, judicial affairs.

It is recommended that the notion that the Minister is or may be a party to any matter before the tribunal be removed from the clause.

The so-called independence of the tribunal is further undermined, as the Minister appoints all the members of the tribunal. It is commendable that, in this instance, there is, in fact, guiding criteria contained in the clause, and that the Minister's decision-making power is therefore constrained. It is, however, still improper for the Minister to appoint the members of a tribunal in which the Minister themselves, per the same clause, will always be a party.

It is recommended that the President appoint the members of the tribunal, in accordance with established constitutional rules for the appointment of judicial officers. After all, in clause 12's proposed section 13G, it is the President who is empowered to reappoint members of the tribunal after the expiry of their terms, and to remove members.

Clause 12's proposed section 13J, prohibits members of the tribunal from representing anyone who is a party to the tribunal's proceedings. The Minister, as we have already seen, is entitled to be a party in any proceedings before the tribunal, and the members effectively represent the Minister because they are appointed by the Minister, and subject to the Minister's regulations and prescriptions in terms of the legislation.

Clause 12's proposed section 13N allows the Minister to delegate any power conferred on them by the Act to an official of the department who holds the rank of Deputy Director-General or higher. This power to delegate is not subject to any substantive criteria, other than excluding the power to make

regulations from its purview. In other words, a Deputy Director-General may be delegated the function of appointing members of the tribunal established in terms of clause 12. It is undesirable for such unrestrained power to be found in parliamentary legislation.

It is recommended that the power of the Minister to delegate be subjected to substantive guiding and constraining criteria.

3. Constitutionalism and the Rule of Law

3.1 Constitutionalism

A constitution, properly understood, is a special type of law that, unlike other laws, addresses itself to the government of a society, and lays out what that government may, and crucially, what it *may not* do. The core idea of constitutionalism is that *everything which government is not explicitly allowed to do, is forbidden.* Constitutions are one of those things a society cannot afford to get wrong, because they are not transient. All future governments – not always of the same political party – will interpret them differently and according to their own ideological frameworks.

Chapter 2 of the Constitution does not 'create' rights, but merely protects pre-existing rights. Indeed, section 7(1) states that the Bill of Rights "enshrines" the rights, not creates them. Sir Thomas More once aptly noted:

> "Some men think the Earth is round, others think it flat. But if it is flat, will the King's command, or an Act of Parliament, make it round? And if it is round, will the King's command, or an Act of Parliament, flatten it?"

Enshrining something, in the constitutional sense, means to place that thing somewhere where it is protected, in this case, in a constitution.[8] But legislation cannot change reality, in this case being the reality of rights: South Africans have rights outside of the Constitution, and if a provision in the Bill of Rights is repealed or legislation undermines a right, 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. We are rights-bearing entities because we are humans with dignity and individuality, not because government has 'given' us those rights.

If protection for human rights is undermined, South Africa's constitutional project will be severely undermined in that the Constitution will continue to recognise the rights in question, but will not protect them effectively. This is not a situation South Africans would want to find themselves in.

3.2 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:

[8] See https://dictionary.cambridge.org/dictionary/english/enshrine.

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."[9]

The Rule of Law thus:

- Permeates the entire Constitution;
- Prohibits unlimited arbitrary or discretionary powers;
- Requires equality before the law;
- Excludes arbitrariness and unreasonableness; and
- 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."[10]

The report also identifies four threats to the Rule of Law,[11] 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."[12]

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

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

10 Good Law Project. *Principles of Good Law.* (2015). Johannesburg: Law Review Project. 14.

11 Good Law Project (footnote 10 above) 29.

12 Von Hayek FA. *The Constitution of Liberty.* (1960). 206.

excludes the existence of arbitrariness, of prerogative, or even wide discretionary authority on the part of the government".[13]

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".[14] 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".[15]

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.[16]

3.3 Socio-economic impact assessments

The opposite of arbitrariness – the principal phenomenon the Rule of Law stands against – 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.[17] 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.[18] 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 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

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13 Dicey AV. *Introduction to the Study of the Law of the Constitution.* (1959, 10th edition). 202-203.
14 Dicey (footnote 13 above) 184.
15 Dicey (footnote 13 above) 198.
16 Section 51 of the Basic Conditions of Employment Act (75 of 1997) is therefore evidently unconstitutional.
17 Hoexter C. *Administrative Law in South Africa.* (2012, 2nd edition). Cape Town: Juta. 344.
18 Hoexter (footnote 17 above) 340.

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. Section 195(1)(g) applies to all organs of State, including Parliament.

In *Principles of Good Law*, the Good Law Project writes:

> "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."[19]

It goes on to describe what a SEIA would encompass:

> "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."[20]

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

> "**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."[21]

The DPME regards SEIA as more than a mere cost-benefit analysis. SEIA, 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.[22]

That regulations or legislation can lead to unintended consequences is acknowledged by government. It may happen as a result of inefficiency, excessive compliance costs, overestimation of the benefits

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19 Good Law Project (footnote 10 above) 34.

20 Good Law Project (footnote 10 above) 35.

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

22 DPME (footnote 21 above) 7.

associated with the regulation, or an underestimation of the risks involved with following through with the regulation.[23]

The SEIA System applies to legislation and regulations, as well as policy proposals, like BBBEE codes.[24]

A proposal of such magnitude as expropriation without compensation should, before further discussion is had on whether it must be pursued, be accompanied with an independent report on the socio-economic consequences that such an amendment will have for society. The DPME's SEIA System would obviously not apply to Parliament, but the constitutional requirements outlined above that apply to all organs of State must clearly be complied with.

[23] DPME (footnote 21 above) 4.
[24] DPME (footnote 21 above) 8.