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Oppergesag van die Reg

RULE OF LAW PROJECT
FREE MARKET FOUNDATION

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SUBMISSION TO THE CONSTITUTIONAL REVIEW COMMITTEE ON THE 2020 ANNUAL REVIEW OF THE CONSTITUTION

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EXECUTIVE SUMMARY

Despite the fact that the Constitution is often heralded as one of the most liberal in the world, it has been applied and interpreted in profoundly illiberal ways that undermine rather than advance the liberty of South Africans.

In this submission, the Free Market Foundation firstly appeals to Parliament, and government broadly, to appreciate the importance of section 1 of the Constitution, which has been neglected in public policy. Section 1 is the most entrenched provision in the Constitution and contains the values that must inform all law and government conduct: The advancement of human rights and freedoms, non-racialism and non-sexism, the Rule of Law, and constitutional government.

Secondly, the importance of impact assessments in public policy is discussed as a constitutional imperative that government has also neglected. Impact assessments inform the public about the potential unintended and detrimental consequences of new legislation, regulation, and policies, and must be fair and balanced. Without such assessments, public participation is government is undermined.

Thirdly, we briefly elaborate on the nature of constitutionalism that government must also have regard to when going about its businesses, and this is done with particular reference to the Constitution Eighteenth Amendment Bill and threats to nationalise the Reserve Bank. Both these envisioned interventions would undermine the fabric of constitutionalism within which the Constitution rests, and must be abandoned.

Finally, the nature and operation of sections 36 (the general limitations provision) and 37 (the derogation provision) of the Constitution are elaborated with reference to how these provisions ought to (have) operate(d) during the COVID-19 lockdown. We are concerned that government has gone beyond what the Constitution allows it to do during times of public crisis, and encourage a return to constitutional conformity.

FREE MARKET FOUNDATION AND RULE OF LAW PROJECT

The Free Market Foundation[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 Free Market Foundation 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 Free Market Foundation'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

Despite the fact that the Constitution is often heralded as one of the most liberal in the world, it has been applied and interpreted in profoundly illiberal ways that undermine rather than advance the liberty of South Africans.

Section 45(1)(c) of the Constitution provides that there shall be a joint Constitutional Review Committee that must "review the Constitution at least annually". Rule 102(2) of the Joint Rules of Parliament provides that the Constitutional Review Committee must call for public comments "on any constitutional matter" for the purposes of this review and obliges the committee to take such comments into account. This submission is tendered pursuant to these provisions.

This submission by the Free Market Foundation (FMF) aims to achieve four objectives.

Firstly, the FMF appeals to Parliament, and government broadly, to appreciate the importance of section 1 of the Constitution, which has been neglected in public policy. Secondly, the importance of impact assessments in public policy is discussed as a constitutional imperative that government has also neglected. Thirdly, we briefly elaborate on the nature of constitutionalism that government must also have regard to when going about its businesses, and this is done with particular reference to the Constitution Eighteenth Amendment Bill and threats to nationalise the Reserve Bank. Finally, the nature and operation of sections 36 (the general limitations provision) and 37 (the derogation provision) of the Constitution are elaborated with reference to how these provisions ought to (have) operate(d) during the COVID-19 lockdown.

The FMF welcomes the opportunity to make this submission.

2. THE IMPORTANCE OF SECTION 1

Section 1 of the Constitution, along with section 74 (the constitutional amendment provision), is the most entrenched provision in the Constitution. It may only be changed with an affirmative vote of 75% of the National Assembly, a generally elusive parliamentary majority for any single political party. This is for good reason. Section 1, said to be "the Constitution of the Constitution", provides not only the fundamental values upon which South African society is thought to be based, but on which the Constitution, itself a value-laden law, is also based. All constitutional interpretation, construction, and practice must happen with the values enshrined in section 1 foremost in mind.

It is our view that government has not paid enough, if any, mind to section 1. When government does contemplate constitutional values, it usually references the Preamble, a part of the Constitution that is without enforceable effect, or various rights in the Bill of Rights. Rarely, if ever, is section 1, the most important part of the Constitution, considered.

This is problematic, because section 1's values are actionable and substantive: They must be adhered and given effect to, otherwise the offending entity is trafficking in unconstitutional territory. We have regrettably seen this play out since the Constitution's enactment.

2.1 1(a): Human rights and freedoms

Section 1(a) provides that South Africa is based *inter alia* on the "advancement of human rights and freedoms". Regrettably, government has treated section 1(a) as if this clause is absent.

A recent example of this, among many, is the National Sport and Recreation Amendment Bill, 2020, which effectively proposes to nationalise the civilian sporting industry and regulate various aspects of that industry. How can it be that South Africa is truly based on the advancement of human rights and freedoms if government is reducing the scope of freedom in such personal and intimate affairs like sporting and recreation?

The same is particularly true of interventions like the Constitution Eighteenth Amendment Bill that will be discussed below. This intervention will deprive South Africans of their hard-won (and incredibly necessary) property rights, which are a prerequisite for the exercise of freedom and the attainment of prosperity.

Finally, it is worth noting that had this provision been given the due respect and recognition it demands, South Africa's unemployment rate would not be nearly as high as it is today. The Bill of Rights, particularly sections 9 and 23, have been interpreted in such a way that government has been empowered to disregard the human rights and freedoms of the jobless in favour of those with trade union membership. Section 1(a) read with section 22 of the Constitution as a matter of course must have the consequence that jobseekers are not disallowed from seeking employment on such terms that they deem beneficial to themselves.

But legislation such as the National Minimum Wage Act[3] stands in evident conflict with these provisions, by regimenting labour relations in accordance with academic and politically convenient narratives rather than the best interests of the poorest among us. We submit that section 1(a), and also section 1(c) discussed below, must permeate any legislation and regulations promulgated by government, and in this respect, it is evident that this has not happened. Had if happened, legislation like the National Minimum Wage Act would never have been enacted.

2.2 1(b): Non-racialism

It is well-known by now that government has engaged in racialist rhetoric and public policy since the dawn of constitutional democracy in South Africa. It has found ways in the Constitution of justifying this conduct but has paid no mind to the fact that those justifications are borne out of provisions in the Constitution that must be read as compliant with section 1, and particularly section 1(b), which prohibits racialism. Thus, even if one can, upon a very strained reading, regard section 9 as allowing, or even obligating, government to engage in racial policymaking, the presence of section 1(b) makes such an enterprise constitutionally impossible.

In other words, those provisions in the Constitution which *seem to* justify racialist policy measures, legally cannot do so, because section 1(b) of the Constitution proscribes it entirely. Government appears to be ignorant of this fact.

2.3 1(c): The Rule of Law

The Rule of Law is often touted by government and opposition officials without any regard being paid to its substance. It is used as filler-text in political speeches and press statements. When it comes to the actual content of the Rule of Law, government has in many ways not complied with any such requirements.

[3] National Minimum Wage Act (9 of 2018).

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."[4]

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."[5]

The report also identifies four threats to the Rule of Law,[6] the most relevant of which, for purposes of this submission, is the following:

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

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

6 Good Law Project (footnote 5 above) 29.

> "[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."[7]

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 an intellectual pioneer 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".[8]

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".[9] 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".[10]

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 decide "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

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7 Von Hayek FA. *The Constitution of Liberty.* (1960). Chicago: University of Chicago Press. 206. My emphasis.

8 Dicey AV. *Introduction to the Study of the Law of the Constitution.* (1959, 10th edition). London: Macmillan. 202-203.

9 Dicey (footnote 8 above) 184.

10 Dicey (footnote 8 above) 198.

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.[11]

3. SOCIO-ECONOMIC IMPACT ASSESSMENTS AND CONSTITUTIONAL GOVERNMENT

Section 1 of the Constitution, in section 1(d), also sets out the values that characterise constitutional government, including "accountability, responsiveness and openness".

Since 2015, almost two decades after the enactment of the Constitution, government has required the production and publication of socio-economic impact assessments on interventions such as new policies, regulations, and legislation. Despite this (late) requirement, even today these assessments are not conducted on some of the most important interventions. For instance, the Constitution Eighteenth Amendment Bill, a constitutional amendment, had no accompanying impact assessment to quantify the potential adverse consequences such an amendment could have for South Africa's society and economy. No impact assessments were conducted on the government response to COVID-19 either, despite the consequences of their introduction obviously having a disastrous impact on the economy. Even where impact assessments are conducted, they are often improperly constituted, rife with selection and confirmation bias, and replete with intellectually dishonest claims.

Impact assessments are a useful way of measuring government's responsiveness and openness, as they are a key enabler to substantive, good faith public participation.

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.[12] 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.[13] 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 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:

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[11] For example, section 51 of the Basic Conditions of Employment Act (75 of 1997) is therefore evidently unconstitutional.

[12] Hoexter C. *Administrative Law in South Africa.* (2012, 2nd edition). Cape Town: Juta. 344.

[13] Hoexter (footnote 12 above) 340.

"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."[14]

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."[15]

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."[16]

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.[17]

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[14] Good Law Project (footnote 5 above) 34.
[15] Good Law Project (footnote 5 above) 35.
[16] Department of Planning, Monitoring and Evaluation (DPME). "Socio-Economic Impact Assessment System (SEIAS): Guidelines." (2015). 4.
[17] DPME (footnote 16 above) 7.

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 associated with the regulation, or an underestimation of the risks involved with following through with the regulation.[18]

The SEIA System applies to legislation and regulations, as well as policy proposals, like BBBEE codes.[19]

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, because it is a policy that originated in the executive branch of government, but the constitutional requirements outlined above that apply to all organs of State must clearly be complied with.

4. EWC, SARB NATIONALISATION, AND THE NATURE OF CONSTITUTIONALISM

4.1 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.

The Constitution of South Africa is not meant to be completely inflexible or completely flexible. Section 74 provides that section 1 of the Constitution may be amended with a 75% majority vote of the National Assembly and the support of six provinces in the National Council of Provinces, and the remainder of the Constitution may be amended with a two-thirds majority of the National Assembly and the support of six provinces in the National Council. The remainder of the section sets out various other procedures and considerations.

But if the Constitution is to be amended, the process must not simply amount to Parliament going through the constitutional procedure and adopting the amendment. There must be a drawn-out, years-long public consultation process to determine whether a national consensus exists. The Constitution says how an amendment must be processed, but a government cannot act without a mandate. And a mandate to amend the country's highest law must be firm and far broader than a single political party's core constituency.

One must also bear in mind the nature of the Bill of Rights. 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. Enshrining something, in the constitutional sense, means to place that thing somewhere where it is protected, in this case, in a constitution.[20] South Africans have

[18] DPME (footnote 16 above) 4.
[19] DPME (footnote 16 above) 8.
[20] See https://dictionary.cambridge.org/dictionary/english/enshrine.

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. We are rights-bearing entities because we are humans with dignity and individuality, not because government has 'given' us those rights.

If the Bill of Rights is thus amended, the basic essence of the right in question must remain. If protection for human rights is removed from the Constitution, 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 protect them. This is not a situation South Africans would want to find themselves in. By implying that government can 'extinguish' a right by removing it from the Constitution, 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.

Any constitution is meant for the ages. The Constitution of the United States — a standard-setter for constitutionalism — has endured for 230 years and been amended only 27 times. South Africa's Constitution has been amended 17 times in 23 years, with most amendments being technical or procedural. Amending the Bill of Rights to enable expropriation without compensation, discussed below, would be the first substantive amendment.

Constitutionalism and the Rule of Law require long-term thinking, which recognises that the government of today is not the government of tomorrow, and that the outrage currently dominating public opinion will not always be around.

If our Constitution should lose its basic character as a shield for the South African people against undue government overreach within the period of only one political party's rule, there can be no doubt that tyranny is the rule and freedom has again slipped through our grasp.

4.2 Constitution Eighteenth Amendment Bill

The FMF made a full submission on the Constitution Eighteenth Amendment Bill (the Amendment Bill) and may be accessed elsewhere.[21] Here follows a brief summary of that submission.

The public participation process that has brought South Africa to this point where an amendment to the Constitution seems imminent, has been flawed in both substance and procedure. This is particularly the case in light of the inadequate time period allowed by the *ad hoc* committee for the public to provide comments on the Amendment Bill, and in light of the foregone conclusion reached by the Constitutional Review Committee before it set out to invite public comments.

The amount of time allocated to considering an amendment adopting expropriation without compensation is not enough by any stretch of the imagination. Amending the Constitution, especially a section of the Bill of Rights, based on slightly more than a year's discourse and consultation would be a grave injustice.

[21] Nolutshungu TA, Van Staden M, Jonker J, and Mthembu Z. "Submission to Parliament on the draft Constitution Eighteenth Amendment Bill, 2019". (2020). Free Market Foundation. https://www.freemarketfoundation.com/publications-view/submission-on-constitution-eighteenth-amendment-bill-2019.

Good faith public participation is a prerequisite for the validity of any new legislation, policy, or regulation. If this is not done, government does not have a mandate to continue. In the case of the present constitutional amendment, no national consensus has been reached on the apparent necessity of changing the Constitution, and if it has, this has certainly not been evident from the public participation process. As a result, government is acting without a mandate.

It must be made clear that the FMF opposes the enterprise of amending the Constitution *per se*. The Constitution already makes ample provision for substantive land reform and amending the Bill of Rights to satisfy (ostensible) passing political passions sets an incredibly dangerous precedent for future generations. The notion of expropriation without compensation offends the doctrine of constitutionalism. The FMF's primary submission to Parliament, then, is that the Amendment Bill ought to be abandoned, along with any plans to make changes to South Africa's constitutional law.

The rhetoric surrounding the Amendment Bill and government's campaign to bring about an amendment to the Constitution has been almost exclusively focused on restitution. Restitution means property that was illegitimately taken from its owner in the past, is returned to that owner or their descendant. This is a matter of justice, hence why much of government's rhetoric is not impeachable. The problem is that the rhetoric surrounding the Amendment Bill conceals the reality of the amendment. To date, government has had a policy preference for redistribution and nationalisation (as opposed to restitution), meaning that should the Amendment Bill be adopted, it is likely to be utilised to take land from often-legitimate owners, and give it to persons unrelated to that land. Alternatively, government itself is simply going to assume ownership or 'custodianship' of the property and lease it to ordinary South Africans. Both these situations are unacceptable. *Restitution is a moral and constitutional imperative, but redistribution and nationalisation offend against the idea of property ownership.* Government's rhetoric must match its actual intentions, otherwise the public is deceived.

The preamble to the Amendment Bill emphasises the fundamental importance of property ownership, but the amendment itself will drastically undermine the institution of ownership. The requirement to pay compensation when property is expropriated is an essential safeguard for the human dignity, economic interests, and personal liberty of property owners, not to mention for the economy as a whole. In the absence of this requirement, security of ownership becomes precarious, because of government's newfound power to seize property without having to pay for it. As a post-Apartheid society, we should be engaged in the strengthening of ownership, not weakening it.

The very idea of introducing a notion of 'expropriation without compensation' into South Africa's constitutional law is problematic. Expropriation without compensation is a contradiction in terms, as compensation has been conceptually married to expropriation since the time when the doctrine of expropriation was developed. By revoking the right to compensation, government denies the prior ownership (in the case of legitimate owners whose property is being nationalised or redistributed) or holdership (in the case of *bona fide* holders whose property is being restituted to the legitimate owners) of those who held the property. They are therefore liable to lose their livelihoods and have their human dignity ignored. The economy, too, will not survive such a perversion of constitutionalism, as no rational investor or developer will in future wish to acquire or invest in real property in South Africa, when their ownership is being denied by government.

The Amendment Bill also offends international law in that it will treat owners and holders of expropriated property unequally from others whose property is not expropriated, and this unequal treatment will be of an arbitrary nature.

Expropriation without compensation is unheard of among the open and democratic societies (a standard to which our Constitution strives) around the world, and every country that has attempted to implement it, has become a poor, repressive society. The only universally recognised instance of expropriation without compensation, is where the property of persons who have been convicted of an offence, and the property was used in the commissioning of that offence, is seized by government. The Amendment Bill will place property owners and holders on the same level as white-collar criminals as far as security of ownership is concerned.

Most importantly, the Amendment Bill, in its current form, delegates to Parliament an unrestrained discretionary power to determine the circumstances under which no compensation need be paid in expropriation cases. In those circumstances, the courts may decide whether it is just and equitable for no compensation to be paid. It has however come to pass that the Amendment Bill may be changed to empower the executive, not the courts, to make such determination. Both possibilities, however, are unacceptable. This clause in the Amendment Bill makes it evident that it does not merely confirm what the constitutional text already implies, but introduces a detrimental, anti-constitutional, regime into the text. To allow Parliament, invariably the dominant parties in Parliament, to decide whimsically which circumstances might justify expropriation without compensation, is remarkably dangerous. Should the Amendment Bill proceed, it must include a closed list of such circumstances.

The Amendment Bill is not only dangerous to South Africa's constitutional order and potential for prosperity, but it is unnecessary. Government already has the means to bring about far-reaching, substantive land reform that will benefit the economy in general, and more especially those most disadvantaged by Apartheid in particular.

The greatest number of victims of Apartheid land law are inhabitants of the peripheral townships located outside urban areas. They are characterised by underdevelopment and low levels of service delivery. Their suburban counterparts – of which they should rightly be considered part – are developed and receive adequate service delivery. The reason for this underdevelopment is the lack of property rights, moreover ownership. During Apartheid, so-called migrant workers from the homelands settled here, but because of racially discriminatory law, could not own the property. They had to rent it from the local municipality. Twenty-six years after the end of Apartheid, it is unjust that this continues unabated. Government has it within its immediate power to effect the transfer of title deeds to those who are entitled to them in townships, without weakening property rights.

Government has also made repeated reference to so-called "mega-farming", whereby an increasingly small number of wealthy farmers are gaining control of an increasingly large area of agricultural land. This, it is argued, drives up the price of land and makes it difficult for emerging, mostly black, farmers to own agricultural land. However, government's own policies are partly to blame for the mega-farming phenomenon. The Subdivision of Agricultural Land Act, and its potential successor, the Preservation and Development of Agricultural Land Bill, both disallow agriculturalists from subdividing their land into smaller, more affordable plots, and selling them, without going through a complex bureaucratic process of obtaining permission. Instead of weakening the constitutional property rights

provision, government can instead repeal the Subdivision Act and make it easier for potential and emerging farmers to purchase land.

It has been well-documented that all three spheres of South Africa's government, including State-owned enterprises themselves, are in possession of vast quantities of land throughout the country. Much of this land is either unused (often in the case of reserved municipal land) or underutilised (invariably the case in farms owned by the State). Rather than interfering with private property rights, discouraging investment and undermining human dignity, government could freely distribute this land to deserving families and entrepreneurs.

Another initiative by government that is commendable is an online platform that would allow agriculturalists to make their property available to others. Such voluntary schemes ensure that coercion is avoided, ensuring peaceful coexistence, and inclusive development.

It is evident that government has many valid tools at its disposal to pursue land reform. Expropriation without compensation is offensive to constitutionalism and should not be considered an optional route to a prosperous future.

4.3 Threats to nationalise the Reserve Bank[22]

There have, for several years, been threats to nationalise the South African Reserve Bank..

This represents one of many different calls to undermine and weaken South Africa's constitutional dispensation that must be resisted.

It is regrettable that all around the world in post-colonial societies, from Eastern Europe to South America and certainly Africa, there has been a sense of 'constitutions without constitutionalism', where almost every new administration desires its own new constitution. In this process, constitutions are overthrown, suspended, ignored, or repealed. This undermines the purpose and idea of constitutionalism, which is to have a long-lasting and stable highest law that is subject to few or no changes.

The South African Constitution is barely three decades old, making it an incredibly young constitution. Changing the ownership structure of the Bank, possibly for the purpose of engaging in surreptitious influence over its monetary policy by those in charge of fiscal policy, even without expressly changing the Bank's constitutional mandate, would have a deleterious effect on the stability of the Constitution.

These calls to "nationalise" the South African Reserve Bank imply that the Bank is, at the very least, a quasi-private entity, thereby raising questions about the correspondence between legal definitions and the realities of control, policymaking, and administration. In fact, the Reserve Bank is a statutory creation of the South African Parliament, which also determines the main policy goals that the Bank is tasked to fulfil. Further, more than half of the Bank's board of directors, including all the executive directors, are appointed by the President of the Republic in consultation with the Minister of Finance and a governmentally appointed panel. That panel, in turn, approves a list of candidates from which eligible private shareholders may elect the remaining board members.

[22] The bulk of content under this heading was the FMF's submission to Parliament on the South African Reserve Bank Amendment Bill, 2018. The submission was drafted by Prof Richard J Grant.

The private shareholders have no direct control over any aspect of monetary policy or Reserve Bank operations. Their only role is in the election of a minority of board members from a pre-approved list. This involvement is valuable to the extent that it requires greater openness and provides transparency to the operations and auditing of the Bank. Successive amendments to the South African Reserve Bank Act[23] have weakened this role and, with the proposed transfer of all shareholdings to the government, it would be lost completely.

The Reserve Bank has always been an instrument of the State. Despite its corporate structure with ostensibly private shareholding, control has always resided in governmentally appointed officers and the politicians who appoint them. The South African government is also the residual claimant on profits. Dividends paid to private shareholders are statutorily capped at a maximum of 10 cents per share, with any profits in excess of this amount going partly into reserves and the remainder to the government. The private shareholders, their limited voting powers aside, most closely resemble preferred shareholders or fixed-income bondholders. Even in liquidation, the government would have a majority claim on any residual proceeds. Complete nationalisation would require an Act of Parliament and a determination of the compensation owed to private shareholders.

From the perspective of control and monetary policy, the transfer of all shareholdings to the government would have no more effect than if the Reserve Bank repurchased a small portion of its outstanding debentures. The oversight and informational benefits would be lost, but there would not necessarily be any change in policy or in the control mechanisms. The marginal loss of transparency could, over time, increase the risk of more aggressive or more politically sensitive policy interventions. The greatest risk comes from the underlying motivation within Parliament to nationalise the Reserve Bank and how that motivation would be reflected in the enactment of changes to its mission or structure.

Several influential stakeholder groups have expressed their desire for a more aggressive and expansionary approach to monetary policy. But the destabilising and inflationary dangers of a politicised, 'developmental' central bank are well known and any move in that direction would devalue the rand and risk further credit-rating downgrades. A weaker and less predictable currency, along with price instability, invariably distorts capital flows and trade patterns, hindering economic progress and increasing the likelihood of recessions and losses of employment. If a desire for more aggressive monetary policy is indeed the motivation behind the imminent nationalisation proposal, then it is unquestionably better to leave the South African Reserve Bank Act unchanged.

Given that the Reserve Bank has long been a *de facto* nationalised agency, the proposal to transfer all outstanding shares to government ownership would, at best, be a cosmetic change. There is always a danger that legislative changes can lead to unexpected and undesirable institutional consequences. A safer and more predictably beneficial action by Parliament would instruct the Reserve Bank to reduce its inflation target range. This would improve the rand's performance as a currency – both internally and externally – because lowering the inflation bandwith would require higher interest rates and would not require any structural changes at the Bank. It would also have the added benefit of incentivising more saving and alleviating the pressures of the negative savings position of South African households.

[23] South African Reserve Bank Act (90 of 1989).

5. COVID-19 AND SECTIONS 36 AND 37 OF THE CONSTITUTION

Whilst the FMF commends government's swift response to the presence of the novel coronavirus (COVID-19) in South Africa, there is regrettably much to say about the constitutionality of what has since transpired. The FMF's full legal policy brief on the COVID-19 regulations may be accessed elsewhere.[24] Here follows a brief summary of that brief, with particular emphasis on how sections 36 and 27 of the Constitution ought to operate.

Section 36 is the general limitations provision in the Constitution. It sets out the formula with which government must comply if it wishes to limit the rights guaranteed to South Africans and others in the Bill of Rights.

Pursuant to section 36(2), section 36(1) applies to those situations to which section 37, discussed below, does not apply. In other words, for as long as a state of emergency has not been declared in terms of section 37, any encroachment on constitutional rights must be justified according to section 36(1).

Section 37, which has never been invoked since the Constitution became operative in 1997, provides for and regulates the declaration and handling of states of emergency.

Primarily, this provision puts it beyond doubt that protections for certain rights entrenched in the Bill of Rights may be suspended for the duration of a declared emergency, subject to certain safeguards including parliamentary and judicial oversight. The words "suspend" or "suspension" do not appear in the Bill of Rights. Instead, the constitutional terminology is "derogate" or "derogable". Section 37(5), includes a table of non-derogable rights which may not be suspended even during an emergency.

States of emergency are inherently temporary and must be directed at safeguarding the continued existence of the State in response to public disorder. Crucially, states of emergency are a last resort that may only be invoked if the ordinary law of South Africa cannot adequately "guarantee the continuation of the basic order on which liberty depends".[25]

To emphasise, rights in South Africa are always *limited* by operation of section 36(1) of the Constitution. But rights may only be *suspended* (or derogated) after a state of emergency has been declared, as contemplated in section 37 of the Constitution.

The difference between the limitation and suspension of a right is a matter of degree. According to Erasmus:

> "A limitation may only be applied in so far as is necessary for preserving the values enumerated in the limitation clause. It may not be applied in a manner resulting in the complete suppression of the right or freedom."[26]

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[24] Van Staden M. "Civil liberty during a state of disaster or emergency in South Africa: The case of the coronavirus pandemic". (2020). Free Market Foundation. https://www.freemarketfoundation.com/publications-view/civil-liberty-during-a-state-of-disaster-or-emergency-in-sa.

[25] Devenish GE. "The demise of *salus republicae suprema lex* in South Africa: Emergency rule in terms of the 1996 Constitution". (1998). 31(2) *Comparative and International Law Journal of Southern Africa*. 142.

[26] Erasmus G. "Limitation and suspension" in Van Wyk D, Dugard J, De Villiers B, and Davis D (eds). *Rights and Constitutionalism: The New South African Legal Order*. (1996). Oxford: Clarendon Press. 642.

Erasmus further notes that, "The basic core of a right must always remain." This respect for the essential content of rights amounts to "a final boundary for limitations" which, if crossed, "will result in denial of a right".[27] In other words, when the essential content of a right has been extinguished, it has been suspended (section 37) and not limited (section 36). For a suspension to be valid, a state of emergency must have been officially declared and all the requirements of section 37 satisfied.

Section 36 does not *empower* the State to limit rights. Instead, it recognises that rights are always, inherently, limited by any government conduct, and *limits the State in how it may do so*. In other words, section 36 forms a crucial part of the *protection* of constitutional rights and liberties, and is not a party to their infringement.[28] It narrows and controls the scope of limitation, which in the absence of a limitations provision, like in the United States, would have to be determined through judicial discretion.[29]

Section 36 has often been utilised as a "weasel" or "ah-hah" provision that, usually in the public discourse but also among the legal community, is invoked to justify any manner of State infringement of constitutional rights. But the provision does not avail itself to such invocation: According to Erasmus:

> "The power to limit and balance rights does not give an unfettered discretion. It has to result in a finely balanced exercise that permits the unfolding of these rights in a manner that will result in their optimal application in society. A limitation clause is necessary in order to ensure the meaningful enjoyment of fundamental rights and freedoms, not to create a new source of power for the state to be used for curtailing them."[30]

In the case of both limitation and suspension of rights, such measures must be construed and applied *in favorem libertatis* – strictly.[31] In this respect, the courts will have regard to substance and not merely form.[32] In the case of limitations under section 36(1), the courts have to test every instance of an alleged infringement of a constitutional right against the formula set out in that provision.[33]

In times of emergency, per section 37(4)(a), rights may only be suspended if it is *strictly necessary* to bring about an end to the emergency. This, according to Erasmus, means a proportionality test may be conducted by the courts, requiring the State to justify its measures.[34] In this respect, section 36(1) might still provide guidance during times of a declared state of emergency.

Indeed, proportionality "is the main substantive criterion to assess the legality of the suspension measures taken by the state". Such measures "must be proportionate to the threat".[35] Erasmus cites various principles regarding proportionality analysis when rights have been suspended, including the following:

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27 Erasmus (footnote 26 above) 650.
28 Erasmus (footnote 26 above) 640.
29 Erasmus (footnote 26 above) 641.
30 Erasmus (footnote 26 above) 640.
31 Erasmus (footnote 26 above) 629.
32 Erasmus (footnote 26 above) 633.
33 Erasmus (footnote 26 above) 640.
34 Erasmus (footnote 26 above) 657.
35 Erasmus (footnote 26 above) 662.

- Not every derogation from established rights is allowed, even if those rights are not contained in the table of non-derogable clauses. “Each measure of derogation taken in a lawfully declared emergency should be necessary and proportionate to the threat”.
- There must be a relationship between the suspension and the threat.
- The suspension “should potentially be able to overcome the emergency”.
- Less restrictive means that were available in the place of a suspension of rights must be had regard to.[36]

Government only recognises and protects, but does not grant, the rights listed in the Bill of Rights. Because these rights pre-exist the Constitution and government, it makes sense that any limitation of such rights must be interpreted strictly (*in favorem libertatis*). Indeed, government “is obliged to restrain itself when regulating” the exercise of rights.[37] “The general rule”, writes Erasmus, “is the protection of the right or freedom; the limitation is the exception”.[38] Indeed, one of the Siracusa Principles (internationally-accepted guidelines for limitation provisions) is that, “All limitation clauses shall be interpreted strictly and in favor of the rights at issue”.[39]

Any contemplated limitation of a right must have a constitutional purpose as its objective. Extra-constitutional, that is constitutionally trivial, objectives would not suffice to justify the limitation of a right guaranteed in the Bill of Rights.[40] Proportionality analysis is also central to section 36(1)’s legs. Erasmus quotes the Canadian Supreme Court case of *R v Oakes* to set out what proportionality in a limitations provision entails:

> “First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair ‘as little as possible’ the right or freedom in question: *R v Big M Drug Mart Ltd*. Third, there must be a proportionality between the *effects* of the measures which are responsible for limiting the Charter right or freedom and the objective which has been identified as of ‘sufficient importance’.”

It is further noted, again with reference to *Oakes*, that, “The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.”[41]

Section 37 controls the whole area of states of emergency. There are no implied powers or common law or other grounds for exercising additional emergency powers.[42] It is in light of this fact that the constitutionality of the Disaster Management Act, or at least the way the Act has been invoked in the present crisis, might be questioned.

In cases of suspension of rights under section 37, Erasmus writes:

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36 Erasmus (footnote 26 above) 662.
37 Erasmus (footnote 26 above) 640.
38 Erasmus (footnote 26 above) 642.
39 Erasmus (footnote 26 above) 644.
40 Erasmus (footnote 26 above) 647.
41 *R v Oakes* [1986] 1 SCR 103 as quoted in Erasmus (footnote 26 above) 649. *Oakes*’ emphasis.
42 Erasmus (footnote 26 above) 651.

> "Suspension of rights should be interpreted strictly and the formalities and requirements should always be adhered to. The ultimate aim remains the protection of society by safeguarding fundamental rights, constitutionalism, and democratic government. The purpose is never to protect the government of the day."[43]

Crucially, Erasmus writes that limitations provisions (in our case, section 36) "will not provide adequate legal guidance in times of a public emergency." In other words, "A limitation clause authorizes restrictions on fundamental rights under 'normal' conditions".[44] This means when there is, in fact, a time of public crisis, government must either declare a state of emergency, or continue to deal with society normally. It cannot try to use section 36(1) in a way it cannot be used, which is to say: To deprive South Africans so radically of their rights to combat a public emergency that there is nothing left. For this, a state of emergency must be declared.

But an emergency must be imminent or already in progress. Declaring an emergency to *prevent an emergency* is not contemplated by section 37.[45]

The requirement that the "life of the nation" be threatened means the organised existence of society, which underlies the State, must be at risk. [46]

Erasmus writes that, "A state of emergency must be a measure of last resort". In other words, after there has *already* been a breakdown in peace and public order. Until such a time, ordinary law must be utilised.[47]

States of emergency must be officially declared – they may not be implied or implicit in other declarations or announcements. "A *de facto* state of emergency is not permitted", and, "No rights may be suspended unless a state of emergency is first proclaimed".[48] When declared, the courts have an important – and arguably activist – role to play to ensure that the declaration and subsequent government conduct complies fully with the Constitution.[49]

It is regrettable that government has, at large, failed to operate within the generous framework the Constitution provides when dealing with public crises.

The severity of the COVID-19 lockdown, particularly on so-called levels five and four, is so invasive into the rights of South Africans that it cannot be argued that those are mere limitations. Instead, those rights are derogated, or suspended. Here one can think of the prohibition on lockdown levels 4 and 5 of movement outside of the home unless for a small list of allowable circumstances. "Freedom" of movement, as guaranteed in section 21 of the Constitution, is totally absent.

Government's failure to declare a state of emergency to constitutionalise such suspension of rights is unlawful, but understandable. The grounds for declaring a state of emergency are absent: There has been no breakdown in public order and the existence of South Africa is in no way threatened. Thus, no state of emergency can lawfully be declared. What this means is that government must radically reduce the intrusiveness and invasiveness of the regulations it has promulgated during the lockdown

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43 Erasmus (footnote 26 above) 651.
44 Erasmus (footnote 26 above) 652. Citations omitted.
45 Erasmus (footnote 26 above) 653.
46 Erasmus (footnote 26 above) 653.
47 Erasmus (footnote 26 above) 655.
48 Erasmus (footnote 26 above) 655-656.
49 Erasmus (footnote 26 above) 657.

to ensure it is compliant with section 36 of the Constitution, which allows it merely to limit, not derogate, rights.

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