



FREE MARKET FOUNDATION

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Free Market Foundation submission on the RULE OF LAW, founding provision in the Constitution

To: Committee 3 (Social Cohesion and Nation Building in South Africa:
Levels of trust among and between citizens and institutions)
High Level Panel on the Assessment of Key Legislation

By: Free Market Foundation

1. The Free Market Foundation

The Free Market Foundation (FMF) is an independent non-profit 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.

2. General comments on the rule of law

The Constitution, in the initial Chapter containing Founding Provisions, states in its very first section that the Republic is “founded on ... values” which include “supremacy of ... rule of law”.

The rule of law, as one of the “Founding Values”, enjoys elevated constitutional status. It is in the first section of the Constitution which may be amended only by a combination of 75% of the national Assembly and six of the provinces in the Council of Provinces. Unlike the Bill of Rights, the founding provisions are absolute because they are not subject to the Limitation of Rights in clause 36. Everything in the Constitution must be interpreted in accordance with the founding provisions. The rule of law prescribes positive standards with which all law and practise must comply. It is not synonymous with freedom, justice or property rights, but increases the likelihood of those ideals being attained. It has been found by the Constitutional Court to be justiciable. It must therefore be upheld and enforced by the courts. Any law or administrative act inconsistent with it is unconstitutional.

3. What is the rule of law?

The rule of law, as I (admittedly a long retired old lawyer) understand it, refers to a structural exercise of rule as opposed to the idiosyncratic will of kings and princes. Even where the latter may express itself benevolently the former is morally and politically superior. Where the rule of law does not apply, rulers assume entitlement to rule; the rule of law, on the other hand, places the emphasis upon structured responsibility and obligation.

Nelson Mandela

4. How is South Africa doing on the rule of law?

Many laws passed by parliament do not comply with the rule of law. Even if the courts interpret the rule of law generously (so as to minimise judicial interference with the legislative branch of government) the spirit and purpose of the rule of law should be fostered by government at all three levels and in all its forms.

The rule of law is under threat in the following respects:

4.1 Separation of powers. One of the greatest apartheid travesties was executive branch capture of law-making and judicial functions. The apartheid mindset did not die with apartheid. More laws is made by decree in Pretoria than by legislation in Cape Town. Executive law takes many forms: regulations, decrees,

directives, guidelines etc. Adjudication is increasingly an executive function, also in various guises: ombuds, ombudsmen, tribunals, commissions, boards and non-judiciary "courts". Decisive action is needed to conflate powers in the executive only under exceptional circumstance, not as a norm.

4.2 Administrative discretion. Under the rule of law (as opposed to the 'rule of man') administrative discretion must be minimised. Rights and obligations should, as far as reasonably possible, be determined by objective instead of discretionary power. In rare cases where exceptional circumstances justify discretion, it must be exercised to advance clearly defined goals and according to objective criteria. It should also be subject to merit appeal to the courts.

4.3 Equality. The rule of law requires "laws of general application", in other words equality at law or laws that apply equally to all. The Constitution allows strictly limited departures to redress the effects of "unfair" discrimination regardless of its form or when it occurred. Apart from that, everyone must be treated equally. Laws that have the effect of discriminating against the poor, small business, the unemployed, farmers or any other category violate the rule of law.

4.4 Checks and balances. The rule of law is essentially a set of checks and balances against the abuse of power. The preceding three items may be the most important aspects of the rule of law, but they are not exhaustive. Other aspects include the prohibition retroactive laws, the requirement that laws may not be vague or ambiguous, the need for impartiality, and so on.

An example of legislation that violates the letter or spirit of the rule of law in many provisions is the Mineral and Energy Resources Development Amendment Bill (which has been referred back to Parliament by the President). A copy is attached with dubious provisions highlighted. Had the Bill been subjected to rule of law screening it would not have reached Parliament in this form. All proposed laws and extant laws should be subjected to rule of law scrutiny. Although rule of law screening should be part of constitutionality screening the fact that it is foundational and enjoys "supremacy" means that it should be taken especially seriously. To that end more than technical appreciation amongst politicians and officials is required. It should be part of the national ethos and inform the climate of opinion.

5. Recommendations

5.1 Legislation. To give effect to the rule of law there should be dedicated legislation along the lines of other laws enacted to give effect to the Constitution. Such legislation would:

- 5.1.1 Define "the rule of law",
- 5.1.2 Empower an existing or new antonymous organ of state to ensure that it is generally appreciated, respected and observed, and
- 5.1.3 Provide for the creation and updating of Guidelines along the lines of those created by the Presidency for Socio-Economic Impact Assessments.

5.2 State Law Advisor. The SLA should be mandated to generate, circulate and publish rule of law Guidelines. These can, in due course, form the basis of mandatory prescripts.

Attachments

- 1. Guidelines for the State Law Advisor to give effect to the rule of law
- 2. Mineral and Energy Resources Development Amendment Bill with problematic provisions highlighted by way of example
- 3. Article: Rule of law under siege
- 4. Article: Discretionary powers and rule of law
- 5. Article: Equality, constitutionality and the rule of law
- 6. Article: South Africa is buckling under excessive regulation



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ENSURING THAT LEGISLATIVE MEASURES CONFORM TO THE RULE OF LAW:

A GUIDELINE

This document is offered as a general guide to assist government departments ensure that their legislative measures conform to the Rule of Law.

This guideline focusses on legislative measures, and does not deal with administrative action.

Rule of Law: A Founding Value in the Constitution

The Constitution, in the initial Chapter containing Founding Provisions,¹ states in its very first section² that the Republic is “founded on...values” which include supremacy of the constitution and the rule of law.³

These Founding Values enjoy special constitutional protection: This first section⁴ of the Constitution may be amended only by a Bill passed by the National Assembly with a supporting vote of at least 75 per cent of its members, and by the National Council of Provinces with a vote of at least six provinces.⁵

¹ Constitution, Chap 1 (Founding Provisions). Chapter 1 contains six sections:

1. Republic of South Africa
2. Supremacy of Constitution
3. Citizenship
4. National anthem
5. National flag
6. Languages

² Section 1 (Republic of South Africa).

³ Section 1(c).

Section 1 (Republic of South Africa) states in full (*italics added*):

Republic of South Africa

1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) *Supremacy of the constitution and the rule of law.*
- (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

⁴ Section 1. Republic of South Africa.

⁵ Constitution, s 74(1).

(In contrast, the Constitution's second chapter, containing the Bill of Rights,⁶ may be amended by a Bill passed by a vote of only two-thirds of National Assembly members (as well as the National Council of Provinces by a supporting vote of six provinces)^{7, 8)}

These Founding Values have been held to have an important place in the Constitution. They inform the interpretation of the Constitution and other law, and set positive standards with which all law must comply in order to be valid.⁹ The Founding Values are justiciable: They can be enforced by the courts, and any law (or conduct) inconsistent with them can be declared invalid and struck down.¹⁰

That Chapter of Founding Provisions also provides that the Constitution is the supreme law, law (or conduct) inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.¹¹

An important consequence of this is that the Constitution is the source of lawful authority. No legislature, government member or official can make any law (or perform any act) which is not sanctioned by the Constitution.¹²

No special legislation was required to give effect to the Rule of Law

No legislation was required to give effect to the Rule of Law and other Founding Values.

In contrast, the Constitution says national legislation to "give effect to" two fundamental rights, namely the right of access to information¹³ and the right to just administrative action¹⁴ had to be enacted within three years of the date on which the constitution took effect.¹⁵

(Until that legislation was enacted, those two fundamental rights were given the meanings of those rights in the 1993 interim constitution,¹⁶ which did not depend on any such implementing legislation.

(The provisions that required this legislation¹⁷ would lapse if the legislation was not enacted in that three-year period.¹⁸

⁶ Constitution, Chap 2 (Bill of Rights).

⁷ Constitution, s 74(2).

⁸ Any other provision of the Constitution may likewise be amended by a two-thirds vote of National Assembly members. But only by the National Council of Provinces (by a six-province supporting vote) as well, if the amendment relates to a matter that affects the Council; alters provincial boundaries, powers, functions or institutions; or amends a provision that deals specifically with a provincial matter. If the Bill or part thereof concerns only a specific province or provinces, the Council may not pass the Bill or relevant part unless it has been approved by the legislatures of those provinces. Constitution, s 74(3) and (8).

⁹ *United Democratic Movement v President of the RSA* (1), 2002 (11) BCLR 1179 (CC) para [19].

¹⁰ *The Law of South Africa* vol 5(3) 2 ed repl vol, D W Freeman "Constitutional Law: Structures of Government" par 7 fn 11 (citing Currie and De Waal, *The New Constitutional and Administrative Law* (2001) p 73).

¹¹ Constitution, s 2.

¹² *Speaker of the National Assembly v De Lille MP*, 1999 4 All SA 241; 1999 11 BCLR 1339 (SCA), para [14].

¹³ Section 32(2).

¹⁴ Section 33(3).

¹⁵ Sched 6 item 23(1).

¹⁶ Item 23(2); *President of RSA v SARFU*, 1999 10 BCLR 1059 CC par [134].

¹⁷ Sections 32(2) and 33(3).

¹⁸ Section 6 item 23(3).

(The constitution took effect on 4 February 1997.¹⁹ The required legislation²⁰ was timeously enacted within three years after that.²¹)

In contrast to those two fundamental rights, the Constitution did not and cannot require legislation to give effect to the Rule of Law. This is particularly the case now, 20 years after the constitution was adopted.

It is fair to say that the Rule of Law, as a founding value of the Republic's new order, was too important to rely on national legislation in order for it to have effect. The founding values took effect immediately on commencement of the Constitution, and for the two decades since then those values have been applied and interpreted.

Of course this does not mean that legislation in general need not promote the Rule of Law: All legislation (be it national, provincial and municipal) must be consistent with the Rule of Law. All laws should implement and give effect to the Rule of Law. Every legislative body should ensure that its legislation always adheres to the Rule of Law.

Facets of the Rule of Law have been embodied in other provisions of the Constitution

It is said that, although the Founding Values in the Constitution are justiciable, they have frequently been given concrete effect in specific provisions of the Constitution (or ordinary rules of law), meaning the courts may rely on the basic principles, only if there is no directly-relevant express provision of the Constitution (or ordinary rules of law).

This document accordingly does not deal with principles which might form part of the Rule of Law, but which have been embodied as other provisions of the Constitution. These include:

The fundamental rights—

To the equal protection and benefit of the law.²²

Not to be deprived of freedom arbitrarily or without just cause.²³

Not to be arbitrarily deprived of property.²⁴

To administrative action that is lawful, reasonable and procedurally fair.²⁵

To have any dispute that can be resolved by application of law decided in a fair public hearing before a court.²⁶

Of every accused person to a fair public trial before an ordinary court.²⁷

The rules that the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.²⁸

¹⁹ Section 243(1), Proc R6 of 1997.

²⁰ Promotion of Access to Information Act 2 of 2000; Promotion of Administrative Justice Act 3 of 2000.

²¹ These two Acts were assented to on 2 and 3 February 2000 respectively, and were both gazetted on 3 February (Govt Notice 95 of 3 Feb 2000 (*Gazette* 20852); Govt Notice 96 of 3 Feb 2000 (*Gazette* 20853)).

²² Constitution, Chap 2 (Bill of Rights), s 9 (Equality): s 9(1).

²³ Constitution, Chap 2 (Bill of Rights), s 12 (Freedom and security of the person): s 12(1)(a).

²⁴ No law may permit arbitrary deprivation of property. Constitution, Chap 2 (Bill of Rights), s 25 (Property): s 25(1).

²⁵ Constitution, Chap 2 (Bill of Rights), s 33 (Just administrative action): s 33(1).

²⁶ Or, where appropriate, another independent and impartial tribunal or forum. Constitution, Chap 2 (Bill of Rights), s 34 (Access to courts).

²⁷ Every accused person has a right to a fair trial, which includes the right *inter alia* to a public trial before an ordinary court. Constitution, Chap 2 (Bill of Rights), s 35 (Arrested, detained and accused persons): s 35(3)(c).

²⁸ Constitution, Chap 8 (Courts and Administration of Justice), s 165 (Judicial authority): s 165(2).

Laws should not be unpublicised or retrospective

the concept of the rule of law implies that the law be accessible. A person should be able to know of the law, and be able to conform his or her conduct to the law.²⁹

Laws should be general

It is also a Rule of Law concern that laws should apply generally, rather than targeting specific individuals.³⁰

Discretionary powers should not be so broad as have uncertain scope

Statutes should not confer discretionary powers so broad it may lead to arbitrary exercise of power. (The Rule of Law includes the right not to be subject to arbitrary discretionary powers.)

The Constitutional Court has observed that discretion plays a crucial role in a legal system. It permits abstract general rules to be applied to specific particular circumstances fairly. Discretionary powers may legitimately be broad in scope where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the Legislature to identify them in advance. Discretionary powers may also be broadly formulated where the factors relevant to exercise of the discretionary power are clear, or where the decision-maker has expertise relevant to the decisions to be made.

But the discretionary power must not be so broad or vague that the authority to whom the power is delegated is unable to determine the nature and the scope of the powers conferred. For this may well lead to the arbitrary exercise of the delegated power.³¹

Regulations must comply with their authorising statute's empowering provisions

The doctrine of legality, an incident of the Rule of Law, entails that the executive may exercise no power beyond that conferred on it by law:

In exercising a power to make regulations, a Minister has to comply with the Constitution as the supreme law, and the empowering provisions of the Act concerned. If, in making regulations, the Minister exceeds the powers conferred by the empowering provisions of the relevant Act, the Minister acts *ultra vires* (beyond the powers), and in breach of the doctrine of legality, and thus in a manner inconsistent with the Constitution, and his or her conduct is invalid.³²

Laws must not be vague

The doctrine of vagueness is a principle of common law that was developed by courts to regulate the exercise of public power, which is now regulated by the Constitution. The doctrine of vagueness is founded on the Rule of Law. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty, not perfect lucidity. The doctrine of vagueness

²⁹ *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC) para [102].

³⁰ *President of the Republic of South Africa and Another v Hugo*, *ibid*.

³¹ *Affordable Medicines Trust and Others v Minister of Health of RSA and Another* 2005 (6) BCLR 529 (CC) paras [33], [34].

³² *Affordable Medicines Trust and Others v Minister of Health of RSA and Another* 2005 (6) BCLR 529 (CC) paras [48]–[50].

does not require absolute certainty of laws. The law must indicate with reasonable certainty to those bound by it what is required of them so they may regulate their conduct accordingly.³³

The requirement of reasonable certainty accepts that some imprecision is unavoidable. It recognises that in most statutory provisions there will be a core of certainty about the meaning of a provision, and a limited “penumbral” sphere of uncertainty. Where the penumbral sphere of uncertainty is limited, it will not fall foul of the constitutional standard. However, where a provision has “no certain core meaning at all”, or where it has “a significant penumbral scope of uncertainty”, it will probably be constitutionally impermissible. This means that the larger the uncertain penumbral scope of a statutory provision, and especially a criminal prohibition, the more likely that it will be held to be vague. The key question to determine vagueness is whether the provision provides ‘fair warning’ to citizens of what constitutes unlawful behaviour or whether it impermissibly delegates the power to determine who should be prosecuted to law enforcement officers with the attendant risks of arbitrary application.³⁴

Laws must not permit self-help such that a person can judge his own cause

A statutory provision which expressly empowered a body “without recourse to a court of law”, to attach and sell the assets of its defaulting debtors through its own agents and on such conditions as the body’s board of directors might determine, is inimical to the Rule of Law, respect for the which is crucial for a sustainable democracy.³⁵

Laws must have a legitimate government purpose, and a rational relationship to it

There must be a rational relationship between the legislative scheme which a legislature adopts and the achievement of a legitimate governmental purpose. Parliament cannot act capriciously or arbitrarily. The absence of such a rational connection will result in the measure being unconstitutional. An objector who challenges legislation on these grounds bears the onus of establishing the absence of a legitimate government purpose, or the absence of a rational relationship between the measure and that purpose.³⁶

The constitutional requirement of rationality is an incident of the Rule of Law, which requires that all public power must be sourced in law. This means that state actors exercise public power within the formal bounds of the law. Thus, when making laws, the Legislature is constrained to act rationally. It may not act capriciously or arbitrarily. It must only act to achieve a legitimate government purpose. Thus, there must be a rational nexus between the legislative scheme and the pursuit of a legitimate government purpose. The requirement is meant “to promote the need for governmental action to relate to a defensible vision of the public good” and “to enhance the coherence and integrity” of legislative measures.³⁷

³³ *Affordable Medicines Trust and Others v Minister of Health of RSA and Another*, ibid, para [108].

³⁴ *Bertie Van Zyl (Pty) Ltd v Minister for Safety and Security* 2009 (10) BCLR 978 (CC) para 103. *The Law of South Africa* vol 5(3) 2 ed repl vol, D W Freeman “Constitutional Law: Structures of Government” par 26.

³⁵ *Zondi v Member of the Executive Council for Traditional and Local Government Affairs and Others* 2005 (4) BCLR 347 (CC) paras [59], [60].

³⁶ *New National Party of South Africa v Government of the RSA and Others* 1999 (5) BCLR 489 (CC) para [19].

³⁷ *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* [2006] ZACC 23 (CC) at para 21; *Law Society of South Africa and Others v Minister for Transport and Another*, 2011 (2) BCLR 150 (CC) para [32].

Where a legislative measure is challenged on the ground that it is not rational, the court must examine the means chosen in order to decide whether they are rationally related to the public good sought to be achieved. This requirement of rationality is not directed at testing whether legislation is fair, or reasonable, or appropriate. Nor is it aimed at deciding whether there are other or even better means that could have been used. Its use is restricted to the threshold question whether the measure the lawgiver has chosen is properly related to the public good it seeks to realise. If the measure fails on that count, that is the end of the enquiry. The measure falls to be struck down as constitutionally bad.³⁸

The test whether a decision is rationally related to the purpose for which the power was given is an objective one and calls for an objective enquiry. Otherwise a decision that viewed objectively is in fact irrational might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational.³⁹

Separation of Powers is not a facet of Rule of Law

Except to the extent discussed above, the doctrine of Separation of Powers implicit in the Constitution is not normally considered to be a mere facet or component of the Rule of Law (although the Separation of Powers can be said to support the Rule of Law.⁴⁰)

The two topics (Separation of Powers; Rule of Law) are commonly analysed separately.⁴¹ Caselaw does not treat the doctrine of Separation of Powers as being an aspect of the Rule of Law.

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³⁸ *Law Society of South Africa and Others v Minister for Transport and Another*, *ibid*, paras [34], [35].

³⁹ *Pharmaceutical Manufacturers Association of SA and Others, In Re: Ex Parte Application of President of the RSA and Others* 2000 (3) BCLR 241 (CC) para [86].

⁴⁰ "The Rule of Law and the Separation of Powers", D Meyerson, *Macquarie Law Journal* 2004 p 1.

⁴¹ See, for example, *The Law of South Africa* *ibid*, "Constitutional Law: Structures of Government": 'Separation of powers' (paras 8–16); 'Rule of Law' (paras 17–27).



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Comment on the Mineral and Petroleum Resources Development Amendment Bill

**Amendments to the Mineral and Petroleum Resources Development Act, 2002, as amended by the
Mineral and Petroleum Resources Development Act, 2008
(Act No. 49 of 2008)**

1. The Free Market Foundation

The Free Market Foundation (FMF) is an independent non-profit 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 human welfare (including better healthcare, increased life expectancy, literacy and educational quality). The foremost question the FMF asks in addressing any policy question, including the contents of the above mentioned Bill is, will this policy be to the long term benefit of the people of South Africa and especially those who are the poorest and most vulnerable? Satisfaction of the fundamental needs and wants of the people are generally achieved by an absence of barriers to entry into the provision of goods and services, allowing the people a choice between the offerings of freely competing providers, including the providers of employment. The Bill and the proposed amendments will therefore be assessed to ascertain whether it is likely to result in the most beneficial conditions for the country's people.

2. The approach followed in commenting on the Bill

This comment deals fundamentally with the nature of the Bill and the extent to which it is inconsistent with the requirements of South Africa's Constitution. It therefore does not contain a section by section comment on the detail of the Bill except to demonstrate the extent to which aspects of the Bill do not comply with the Constitution.

An important Founding Provision of the Constitution, described in section 1(c) is "Supremacy of the constitution and the rule of law". Note that the constitution *and the rule of law* are coupled in describing

the values upon which the Republic of South Africa is founded. Section 2 of the Constitution states that, "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled". Among those obligations is to ensure that laws that are adopted are not in conflict with the rule of law.

3. What is the rule of law?

President Nelson Mandela described the rule of law as follows:

The rule of law, as I (admittedly a long retired old lawyer) understand it, refers to a structural exercise of rule as opposed to the idiosyncratic will of kings and princes. Even where the latter may express itself benevolently the former is morally and politically superior. Where the rule of law does not apply, rulers assume entitlement to rule; the rule of law, on the other hand, places the emphasis upon structured responsibility and obligation.

What follows is an excerpt from a 2007 paper by Leon Louw, Executive Director of the Free Market Foundation, titled *What is the Rule of Law?* It provides a comprehensive and detailed list of specific elements of the rule of law, explanations as to why they constitute the rule of law and what their practical implications are:

- i) **Legality:** The doctrine of legality is that all laws must be lawful in terms of the constitution and adopted according to prescribed procedure.
- ii) **Rationality:** The rationality principle is that there must be a rational connection between the law and its objective, which must be clear. South Africa recently passed a *National Credit Act* which has two stated objectives: to increase 'access' to credit and to increase 'protection' for credit-receivers. What might violate the rationality principle is that a measure which raises the cost and risk of granting credit necessarily *reduces* access. These two objectives in a single bill are inherently contradictory and therefore irrational.
- iii) **Non-discretion:** The most elementary aspect of the rule of law is that there should be little or no administrative discretion. People should be ruled by laws, not by men.
- iv) **Clear objectives:** Where, for whatever reason, there is discretion, as in judicial proceedings and staff appointments, there should be two distinct and easily confused qualifications. Firstly, the purpose for which the power is conferred must be articulated clearly – to what end is the power created? What outcome does the legislature want?
- v) **Objective criteria:** Secondly, there must be objective criteria according to which the power is to be exercised. If an immigration law, for instance, confers the power to grant immigration rights, it should state that its purpose is to attract technical skills or protect people with skills from foreign competition. It should then specify criteria such as the procedure to be followed, ideal qualifications to attract or exclude, and so on.
- vi) **Certainty:** Laws should prescribe clearly and unambiguously that with which citizens must comply, rather than leave them at the mercy of arbitrary or discretionary officialdom. It should be as easy as possible for everyone to know what the law is, and when they are complying with or transgressing it. Uncertainty in law creates real or suspected injustice.
- vii) **Precedent (res judicata):** Certainty implies that rulings for comparable facts will be consistent, to which end there must be access to court records and subsequent judgements must follow preceding judgements. The lack of precedent amounts to the rule of person in that presiding officers are not bound by law, which includes precedent – because earlier judgements purported to be manifestations of the law.

- viii) *Prospectivity (nullum crimen, nulla poena sine praevia lege poenali)*: The requirement that the law should be clear and objective implies that laws should not be retroactive. Retrospectivity should be considered only in extreme circumstances such as the need to correct the unintended consequences of erroneous drafting where the original intent can be presumed to have been unclear to all concerned.
- ix) *Division of powers*: For sound, tried and tested reasons (examples above) a democratic order requires a genuine separation of powers: legislative, executive and judicial. The legislature alone should legislate, the executive alone execute, and the judiciary alone adjudicate. Almost every judgment and publication on the rule of law has judges and writers asserting axiomatically and erroneously that there can be no 'rigid' separation of powers, never giving sound reasons why not.
- x) *Due process and natural justice*: The concept of 'due process' is also sophisticated concept. The purpose of due process is to ensure that 'justice is not only done, but seen to be done'. Due process is part of the rule of law to the extent that it increases the likelihood of proper decisions according to law, that is, people being ruled by laws not discretion. For there to be due process various factors must be present, some of which are prescribed in many constitutions. Here is an illustrative list of elements of due process, each of which lends itself to elaboration, but provided without comment because book-length analysis would be necessary to do justice to all items:
- administrative justice (in that all administrative action must comply with the rule of law, regardless of the legislation under which it falls);
 - the right to be heard (*audi alteram partem*);
 - the right to be aware of evidence being considered;
 - the right to be present and cross-examine witnesses;
 - no trial or quasi-trial without formal charge;
 - the right to written reasons for administrative and judicial decisions;
 - the right of appeal *on the merits* to a truly independent tribunal (ultimately to an independent judiciary);
 - the right to judicial review of judicial and administrative decisions;
 - access to relevant information particularly that in the hands of the state;
 - recusal or dismissal of officials with conflicts of interest, or who are otherwise compromised.
- xi) *Craftsmanship*: All laws and guidelines should be carefully, professionally and skilfully drafted. Legal drafting is a distinctive skill seldom taught in law courses. For laws to be clear, objective and unambiguous considerable care and skill is needed. To this end, all people responsible for drafting laws should not only be conversant with the principles of good law but also with the precise meanings of words used and the general craft of legislative drafting. Draft legislation should be reviewed and edited by independent experts.
- xii) *Stability*: For society to be stable its laws, as far as possible, need to be stable. Laws changing constantly promote instability and uncertainty. They discourage long-term planning and investment. They discourage the attainment of enduring institutions and values. Laws should be formulated for the long term and not on the premise that they can be revisited, repealed or replaced endlessly. Lack of stability is particularly deleterious for the economy. Frequent changes to the law result in costly and time-consuming changes to the nature of business.
- xiii) *Presumption of innocence*: Everyone is presumed innocent 'until proven guilty'.
- xiv) *Double jeopardy*: No one should face more than one procedure for one alleged offence or tort/delict. Additional proceedings or retrials only on the basis of substantial new evidence not previously available to accusers and prosecutors.

- xv) *Equality at law*: Everyone to have the same rights and obligations without *unfair* discrimination on such grounds as status, religion, sexual orientation, political affiliation, gender, race, age and so on. According to Montesquieu 'law should be like death, which spares no one.'
- xvi) *Habeas corpus (ad subjiciendum)*: This translates as 'have the body to be subjected (to examination)'. It also means that everyone is entitled to be free until convicted unless, on examination, there are exceptional grounds for detaining a supposedly innocent person. It implies 'no detention without trial', and not necessarily detention even if there is a proper charge.
- xvii) *Information*: Everyone arrested, charged or accused has a right to know of what wrongdoing they are suspected, and the right to all relevant documentation and other information.

The principal derivatives from the central concept are:

1. Separation of powers
2. General application (equality at law)
3. Due process
4. Prospectivity
5. Objective criteria (for discretionary power)
6. Specified objectives (for discretionary power)

Given that the rule of law is a Founding Provision of the Constitution, it is imperative that all laws that are enacted should be carefully scrutinised in order to ensure that they comply with its requirements. The Mineral and Petroleum Resources Development Amendment Bill is in conflict with the rule, and therefore with the Constitution, in respect of the extent to which it fails to comply with the separation of powers requirement, the general application requirement (equality at law), and the extent to which it lacks specified objective criteria according to which discretionary powers are to be exercised.

4. Administrative discretion

It is a recognised principle of good law, and a requirement of the Constitution and the rule of law, that legislation should provide for a minimum of discretionary power, and when it does so, it should be subject to the Guidance Principle (Dawood and Another v minister of Home Affairs and Others 2000 (3) SA 936 (CC), and Janse van Rensburg NO and Another v Minister of Trade and Industry NNO 2001 (1) SA 29 (CC)). In other words, the legislature should make laws as objective as possible and, when it creates discretionary power, it is obliged to prescribe objective criteria according to which the power is to be exercised.

The doctrine of the Separation of Powers, also part of our Constitution, requires that it is the legislature (by way of statutes) and not the Executives (by way of regulation) that must prescribe those criteria.

There are sound jurisprudential reasons for these provisions being in our Constitution. Were there a better understanding and appreciation of the logic that informs them, there would be less propensity to undermine or ignore them in draft legislation. Firstly, if people do not know their rights and obligations, there will be wasteful confusion, uncertainty and conflict. Secondly, and more importantly, unconstrained discretionary power is the primary cause of corruption and the abuse of power. Corruption is one of South Africa's most disturbing and debilitating problems.

The problems of corruption and abuse should be addressed at two levels: by avoiding discretion and by ensuring that whatever discretion is retained is exercised according to maximally objective criteria, and subject to procedural checks and balances. Appropriate checks and balances include established and proven mechanisms such as mandatory transparency, accountability, due process, rights of appeal (to truly independent courts or tribunals), non-discrimination, and the like.

For these and other reasons, wherever the Mineral and Petroleum Resources Development Amendment Bill creates executive discretion, it should specify the criteria according to which that discretion must or may be exercised, and it should provide for appropriate checks and balances.

The rule of law requires that government should enact only such laws as are general in nature, are applicable to everyone including itself, and which do not attempt to bring about particular outcomes. The rule of law was described by Nobel Laureate Friedrich Hayek in his book *The Constitution of Liberty*:

The conception of freedom under the law ... rests on the contention that when we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man's will and are therefore free. It is because the lawgiver does not know the particular cases to which the rule will apply, and the judge who will apply them has no choice in drawing the conclusions that follow from the existing body of rules and the particular facts of the case, that it can be said that laws and not men rule. Because the rule is laid down in ignorance of the particular case and no man's will decides the coercion used to enforce it, the law is not arbitrary. This, however, is true only if by "law" we mean the general rules that apply equally to everybody.

Matters in the Mineral and Petroleum Resources Act, requiring discretionary decision-making on the part of the Department should be reduced to a minimum by preferably setting out objective criteria in the legislation, with which firms and individuals can comply in conducting their affairs, removing the necessity for prior regulatory approval or administrative consent. Setting of objective criteria for the commencement and conduct of business in the mineral and petroleum field would considerably reduce the need for permit applications and approvals.

Where formal prior approval is considered to be necessary, objective criteria should be set in legislation to guide the administrative process and ensure that the exercise of discretion is carried out uniformly and impartially. The purpose in all cases is to make the law as clear and objective as possible, which facilitates economic activity, the provision of goods and services, and economic growth. Uncertainty resulting from a lack of clarity in laws and regulations, and lack of consistency in official decision-making, imposes unnecessary costs on entrepreneurs and diminishes economic activity.

5. Discretionary powers without objective criteria

The most significant aspect of this Bill is the massive, excessive, and unconstrained power it seeks to place in the hands of the Minister, and to a lesser extent in the hands of the Regional Managers, who are appointed by the Minister in regions designated by the Minister.

Examples of these powers are:

Section 1 (b) 'Beneficiation' means the transformation, value addition or downstream beneficiation of a mineral and petroleum resource (or a combination of minerals) to a higher value product, over **baselines to be determined by the Minister**, which can either be consumed locally or exported;"

Section 1 (i) by the insertion after the definition of "Department" of the following definitions:

" 'designated minerals' means such minerals as the Minister may designate for beneficiation purposes as and when the need arises in the Gazette;
'developmental pricing conditions' refers to a pricing methodology of mineral/s, petroleum or mineral products, reserved for domestic beneficiation, as

determined by the Minister;”;

Section 1 (y) by the insertion after the definition of “State royalties” of the following definition:

“ **‘strategic minerals’ means such minerals as the Minister may declare to be strategic minerals as and when the need arises in the Gazette;**”;

Section 4 The following section is hereby substituted for section 7 of the principal Act:
“Division of Republic, territorial waters, continental shelf and exclusive economic zone into regions

7. For the purposes of this Act the Minister must, by notice in the *Gazette*, divide the Republic [,] including the sea [as defined in section 1 of the Sea-shore Act, 1935 (Act No. 21 of 1935), and the exclusive economic zone and continental shelf referred to in sections 7 and 8 respectively, of the Maritime Zones Act, 1994 (Act No. 15 of 1994),] into regions.”.

Section 5. 9 (1) The Minister may by notice in the *Gazette* invite applications for reconnaissance permission, prospecting rights, exploration rights, mining rights, production rights and mining permits in respect of any area of land, block or blocks, and may subject to the provisions of the Act, prescribe in such notice the period within which any application may be lodged with the Regional Manager and the terms and conditions subject to which such rights and permits may be granted.
(2) Any acreage relinquished or abandoned, or any right or permit that has been cancelled, relinquished, abandoned or has lapsed, will not be available for application until the Minister invites applications as contemplated in subsection (1).”

Section 8. Section 11 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following section:

“(1) A prospecting right or a part of a prospecting right, mining right or a part of a mining right or an interest in any such right [,or any interest] in [a close corporation or] an unlisted company or any controlling interest in a listed company (which [corporations or] companies hold a prospecting right or mining right or an interest in any such right), may not be ceded, transferred, encumbered, let, sublet, assigned, or alienated [or otherwise disposed of] without the prior written consent of the Minister, and subject to such conditions as the Minister may determine.”;

Section 15. Section 20 of the principal Act is hereby amended—

(b) by the substitution for subsection (2) of the following subsection:

“(2) The holder of a prospecting right [must obtain the Minister’s written permission to remove and dispose for such holder’s own account of diamonds and bulk samples of any other minerals found by such holder in the course of prospecting operations] shall not without the prior written permission of the Minister remove bulk samples of any mineral from a prospecting area for any purpose subject to such conditions as the Minister may determine.”; and

Section 18. Section 23 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for paragraph (e), (g) and (h) of the following paragraphs, respectively:

“(e) the applicant has [provided for] complied with the requirements of the prescribed social and labour plan which shall be reviewed every five years for the duration of the mining right;

(g) the applicant is not in contravention of any provision of this Act; [and]

(h) the granting of such right will further the objects referred to in section 2(d) and (f) and [in accordance] complies with the [charter contemplated] Amended Broad Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry provided for in section 100 and the prescribed social and labour plan[.];and”;

(b) by the addition after paragraph (h) of the following paragraph:

- “(i) the applicant has the ability to comply with the relevant provisions of the National Water Act, 1998 (Act No. 36 of 1998).”;
- (c) by the substitution for subsection (2) of the following subsection:
 “(2) The Minister ~~[may]~~ must [,—
 (a) [having regard to the nature of the mineral in question,] take into consideration the provisions of section 26; and
 (b) after taking into consideration the socio-economic challenges or needs of a particular area or community, direct the holder of a mining right to address those challenges or needs.”;
- (d) by the substitution for subsection (2A) of the following subsection:
 “(2A) If the application relates to the land occupied by a community, the Minister may impose such conditions as are necessary to promote the rights and interests of the community [including conditions requiring the participation of the community].”;
- (e) by the substitution for subsection (3) of the following subsection:
 “(3) The Minister must, within [60 days] the prescribed period of receipt of the application from the Regional Manager, refuse to grant a mining right if—
 (a) the application does not meet all the requirements referred to in subsection (1); and

Section 21. Section 26 of the principal Act is hereby amended—

- (a) by the substitution for subsection (1) of the following subsection:
 “(1) The Minister ~~[may]~~ must initiate or promote the beneficiation of minerals and petroleum resources in the Republic.”;
- (b) by the substitution for subsection (2) of the following subsection:
 “(2) If the Minister, [acting on advice of the Board and] after consultation with the] consulting a Minister of [Trade and Industry,] the relevant State department finds that a particular mineral, mineral product or form of petroleum can be beneficiated [economically] in the Republic, the Minister may promote such beneficiation subject to such
 terms and conditions as the Minister may determine.”;
- (c) by the insertion after subsection (2A) of the following subsections:
 “(2B) The Minister shall from time to time by notice in the Gazette determine such percentage per mineral commodity or form of petroleum and the developmental pricing conditions in respect of such percentage
 of raw minerals, form of petroleum or mineral products as may be required for local beneficiation, after taking into consideration the national interest.
 (2C) Every producer shall offer to local beneficiaries a certain percentage of its raw mineral or mineral products as prescribed by the Minister.”; and
- (d) by the substitution for subsection (3) of the following subsection:
 “(3) Any person who intends to [beneficiate] export any designated [mineral] minerals mined or form of petroleum extracted in the Republic [outside the Republic] may only do so [after written notice and in consultation with] with the [Minister] Minister’s written consent 40 subject to such conditions as the Minister may determine.”.

Section 36. Section 49 of the principal Act is hereby amended—

- (a) by the substitution for subsection (1) of the following subsection:
 “(1) Subject to subsection (2), the Minister may [after inviting representations from relevant stakeholders, from time to time] after consulting a Minister of a relevant state department as and when the need arises by notice in the Gazette, having regard to the national interest, the strategic nature of the mineral in question and the need to promote sustainable development of the nation’s mineral resources—
 (a) prohibit or restrict the granting of any reconnaissance permission, prospecting right, mining right or mining permit in respect of land identified by the Minister for such period and on such terms and conditions as the Minister may determine; or
 (b) restrict the granting of any reconnaissance permission, reconnaissance permit, prospecting right, mining right or mining permit in respect of a specific mineral [or mining permit in respect of a specific

mineral or]. minerals or class of minerals identified by the Minister for such period and on such terms and conditions as the Minister may determine.”;

Section 38. Section 51 of the principal Act is hereby amended—

(a) by the substitution for subsections (1), (2) and (3) of the following subsections, respectively:

“(1) Subject to subsection (2), the [Board] Regional Manager may recommend to the Minister to direct the holder of a mining right to take corrective measures if the [Board] Regional Manager establishes that the minerals are not being mined optimally in accordance with the mining work programme or that a continuation of such practice will detrimentally affect the objects referred to in section 2(f).

(2) Before making the recommendation, the [Board] Regional Manager must consider whether the technical and financial resources of the holder of a mining right in question and the prevailing market conditions justify such recommendation.

(3) (a) If the Minister agrees with the recommendation, he or she must, within 30 days from the date of receipt of the recommendation of the [Board] Regional Manager, in writing notify the holder that he or she must take such corrective measures as may be set out in the notice and must remedy the position within the period [mentioned] specified in the notice.

(b) The Minister must afford the holder the opportunity to make representations in relation to the [Board's] Regional Manager's findings within 60 days from the date of the notice and must point out that non-compliance with the notice might result in suspension or cancellation of the mining right.”;

and

(b) by the substitution in subsections (4) and (5) of the words preceding paragraph

(a) of the following words, respectively:

“(4) The Minister may, on the recommendation of the [Board] Regional Manager, suspend or cancel the mining right if—;

(5) The Minister may, on the recommendation of the [Board] Regional Manager, lift the suspension of a mining right if the holder in question—”.

Section 39. Section 52 of the principal Act is hereby amended—

(a) by the substitution in subsection (2) for the words preceding paragraph (a) of 30 the following words:

“The [Board] Regional Manager must, after consultation with the relevant holder, investigate—”;

and

(b) by the substitution in subsection (3) for paragraph (a) of the following paragraph:

“(a) The Minister may, [on the recommendation of the Board and] after consultation with the Minister of Labour and any registered trade union or affected persons or their nominated representatives where there is no such trade union, direct in writing that the holder of the mining right in question take such corrective measures subject to such terms and conditions as the Minister may determine.”.

Section 40. Section 53 of the principal Act is hereby amended—

(a) by the substitution for subsection (3) of the following subsection:

“(3) Despite subsection (1), the Minister may [cause] direct that an investigation [to] be conducted if it is alleged that a person intends to use the surface of any land in a way that could result in the mining of mineral resources being detrimentally affected.”; and

(b) by the substitution in subsection (4) for paragraph (c) of the following paragraph:

“(c) offer that person the opportunity to respond within [30 days] the prescribed period.”.

Section 54. Section 80 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for paragraph (g) of the following paragraph:

(f) by the addition after subsection (6) of the following subsection:

“(7) The State has a right to a free carried interest in all new exploration rights, with an option to acquire a further interest on specified terms through a designated organ of state or state-owned entity as determined by the Minister in the *Gazette*.”.

Section 56. Section 82 of the principal Act is hereby amended—

(c) by the addition after subsection (2) of the following subsection:

“(3) If a discovery is made in the exploration area, the holder of an exploration right must—

(a) notify the Minister of such discovery;

(b) submit an appraisal programme; and

(c) apply for an environmental authorisation and submit relevant environmental reports required in terms of Chapter 5 of the *National Environmental Management Act, 1998*.”.

The sections from the Bill high-lighted above provide examples of the discretionary powers that it would grant to the Minister, a situation that creates a great deal of uncertainty for investors and the managements of South African mining companies. Apart from creating conditions that are not conducive to a well-functioning mining industry, this high level of discretion (not accompanied by objective criteria according to which the powers are to be exercised) is inconsistent with the rule of law and therefore in conflict with the Founding Provisions of the Constitution.

8. Conclusion

This comment deliberately concentrates on the nature of the provisions contained in the law. The reason is that a sound legal system, and particularly adherence to the rule of law, constitute the bedrock upon which the highest and most enduring economic growth and improvement in the living standards of nations have been built. Disrespect for the principles of good law and the rule of law, on the other hand, have led nations to a slide into greater lawlessness, erosion of economies, and a decline in living standards. Such developments should be guarded against and the Mineral and Petroleum Resources Development Amendment Bill unfortunately contains many of the elements that should be avoided.

While the executive branch of government prepares proposed legislation, the legislature has the responsibility to ensure that the Bills that are presented to Parliament are consistent with the rule of law, Constitutional in every respect, and consistent with the principles of good law. This Bill does not meet those requirements and should be returned to the drafters for reconsideration.

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Attachment to Free Market Foundation submission on RULE OF LAW

The Rule of Law under siege in South Africa?

The rule of law is fundamental to South African law. It is enshrined in the first chapter and first section of the Constitution. It is a binding Founding Provision. Section 1(c) provides for the “supremacy of the Constitution and the rule of law”. Despite its pivotal importance for South African law, there is little understanding of what it means, especially for many law-makers. This is one of the legacies of the apartheid era. True transition requires the cultivation of a clear understanding of what the rule of law means in practice; its implications for conceiving of and drafting legislation and regulations.

“The rule of law” is distinguished from “the rule of man”. What that means is that everyone’s rights and duties must be readily apparent from the law and not subject – or subject only in exceptional circumstances – to discretionary power. It also means that substantive laws must be legislated made by an elected, transparent and accountable legislature. They must be executed by the executive, and adjudicated by an independent judiciary. Regulation – sometimes called “subsidiary legislation” inappropriately – should not be thought of as an alternative way of making laws.

Power should be delegated only to the extent needed to execute and implement substantive law (legislation and common law).

The challenge facing South Africa is to have a fundamental break from the apartheid-era mindset in which there was no constitution requiring adherence to the rule of law – parliament was sovereign; it is now an organ of state. A tradition was established according to which almost all legislation amounted to a delegation of illegitimate power to the executive. The three basic functions of government – legislative, executive and judicial – were systematically conflated into an omnipotent, and consequently abusive executive. The legislature, and thus elected and supposedly accountable politicians, became increasingly marginalised and irrelevant. Legislatures at all three levels – national, provincial and local – merely “rubber-stamped” whatever the executive, usually a single minister, wanted. South Africa’s transition has been an extraordinary process, often called “the miracle of transition”. By observing that it is incomplete, I do not trivialise it. On the contrary, it will be undermined if it is not completed by a change in mindset that translates the constitution and the values that inform it into a living reality, where there is spontaneous recognition of measures that are inconsistent with the rule of law in particular, and other constitutional provisions and values in general.

Apart from the philosophical reasons for this “separation of powers”, to prevent the over-concentration of power, there are profoundly practical reasons for it. The legislature operates in accordance with elaborate procedures prescribed by the Constitution, and followed according to Parliamentary convention. These procedures are appropriate for law-making in a democracy. They ensure transparency, accountability, debate, participation and due consideration. They ensure that substantive laws are made by elected politicians.

Regulations, on the other hand, can be gazetted arbitrarily. That they are sometimes preceded by public discourse, or presented to the cabinet, is a matter of discretion, not a requirement of the Constitution generally or its rule of law provision. For this reason regulations should be confined to formalistic measures needed to implement substantive legislation adopted by legislators.

A second practical reason for rigid adherence to the separation of powers principle is that it is the only sustainable way to contain the natural propensity of officials to draft laws that shift power over time from politicians to officials. Their spontaneous inclination is to promote their interests, namely to

formulate laws that enhance their powers, status and incomes. Doing so gradually transfers the de facto legislative function from politicians and parliament to the executive, thus eroding democracy itself. Only if there is critical awareness and vigilance amongst politicians, will the erosion of their powers, the rule of law and democratic values be averted. Most mature democracies and, increasingly, developing countries, ameliorate the problem by having all laws drafted and screened by an autonomous central drafting agency, with trained experts in Constitutional Law.

The third practical reason for strict adherence to the separation of powers doctrine is that executive discretion is the main cause of real and suspected abuse of power, especially corruption. It necessarily generates intolerable and irresistible opportunities and temptations for the abuse of power. The failure to recognise this in South Africa virtually all less developed countries is the principle reason for disproportionate levels of corruption in the third world.

There is no rigid or obvious boundary between legitimate legislation and regulation. But there are clear values and principles embodied in the rule of law that should be appreciated, respected and observed automatically; as a national mindset or ethos. Regulators – usually ministers in their executive capacity – should not “sail close to the Constitutional wind”. They should not get away with as much as they can. There is no need for regulations to test the limits, and they should seldom if ever be the subject of legitimate Constitutional challenge. Acts should be drafted so as to contain all substantive law. Legislators must decide and debate in public what laws they want. Excessive discretionary power is undesirable in practice. It is an inferior way of making law. It is unsound philosophically; at variance with democratic values.

The separation of powers component of the rule of law has two dimensions. It prescribes and proscribes what may or must be in statutes, on one hand, and in regulations on the other. A statute or a regulation may be ultra vires, the former for one and the latter for two reasons. If an Act purports to delegate more power than allowed, it is, to that extent, unconstitutional, regardless of whether the power delegated putatively is used by the executive. Regulations are unconstitutional if they exceed what is authorised by their parent statute, and, even if they accord with it, they are unconstitutional if the delegated power is excessive or ambiguous.

The Constitutional Court has ruled that it must be clear from legislation why powers are delegated – to what end are they to be executed. They must also be accompanied by objective criteria for implementation. Delegated power cannot be implemented capriciously or according to the arbitrary whim of the executive. Statutes must provide clearly and unambiguously for how officialdom must or may exercise powers, and what, precisely, citizens must do to remain within the law. Citizens should not find themselves at the mercy of arbitrary or discretionary power. They should be able to establish with certainty from relevant statutes what their substantive rights and obligations are. What they must do procedurally for the implementation of laws is the legitimate substance of regulations. Typically, regulations should do no more than prescribe formalities: forms to be completed, office hours, registration fees, and the like.

Many new acts, like their apartheid-era predecessors, do not specify the purpose for which it purports to delegate the power under which the draft regulation is contemplated. They do not always specify objective criteria for implementation. To that extent they are or should be found to be unconstitutional. Even if they are constitutional – if the Constitutional Court interprets the Constitution generously, they are certainly undesirable according to the principles of good law.

A requirement of the rule of law is certainty: people are entitled to “know where they stand” so to speak. This is an obvious derivative of the rule of law. If there is no certainty, discretion rather than law

rules. Uncertainty in law creates real or suspected injustice, and increases the probability of bureaucratic inefficiency.

The aspect of the rule of law usually mentioned first in texts on it is the doctrine of equality: that laws must be of general application (an explicit requirement of our Constitution) and apply equally to all. For obvious historical reasons our Constitution allows measures to protect and advance people who are disadvantaged as a result of unfair discrimination.

En passant it should be noted that the Constitution does not refer to race or to people who were “historically” disadvantaged. In other words, it applies to people presently disadvantaged regardless of when they were discriminated against unfairly, which could be in the distant future. A careful reading of the relevant provision raises important jurisprudential questions regarding prevailing practices and policies many of which may be per se violations of the foundational rule of law requirement of equality, without necessarily being legitimised by the exception.

Understandably, there is a propensity to presuppose that the equality requirement of the Constitution refers to racial equality – that targeted discrimination is racial. The challenge to the rule of law of this myopic interpretation is that equality in other senses may be compromised. There are many examples. Most South African legislation and regulation is from the past. There have, for instance, been about 1,000 new acts of parliament since 1994 whilst there are over 3,000 acts still in force. Much if not most pre-transition legislation contains provisions inconsistent with the rule of law. Many post-transition laws also reflect a lack of appreciation of or respect for the rule of law – because of the extent to which the pre-transition mindset survives amongst all concerned with law-making: including legislators, government officials, judges and magistrates, lawyers, NGOs, and representatives of civil society (organised business and labour particularly).

A seminal example that bridges the past with the present is the Consumer Affairs (Unfair Business Practices) Act. It is a reincarnation of the harmful Business Practices Act. Like its predecessor, the new Consumer Affairs Act has extraordinary provisions. It purports to permit the executive branch of government to ban virtually any business practice, which is so broadly defined as to include almost anything anyone does in pursuit of income. Some formalities are prescribed but they are nothing like what is required of the legislature should it want to ban a business practice. In other words, the Act purports to give the executive more law-making discretion than the legislature enjoys under the Constitution.

Additionally, the Act purports to grant the executive an unbridled right to discriminate, a right which is exercised routinely. The net effect is that the executive makes substantive laws, applies them arbitrarily to individual businesses or people (instead of generally to all people), and undertakes quasi-judicial proceedings amounting to a usurpation of the judicial function. Whilst it is required to follow some aspects of the rule of law requirement of due process, it need not and does not comply with the high standards taken for granted in the judiciary, where people have the right to know who their accusers are, of what they are accused, what law it is they are supposed to have violated, the right of access to all relevant information, the right to be present, the right to cross examination, the right of review and appeal, and so on, none of which is applicable to proceedings under the Act.

A derivative of the requirement of legal certainty – the right to know the law – is that laws should not be retroactive. It is obviously inconsistent with the rule of law – you are not being ruled by the law – if you cannot know at the time of doing something whether it is lawful. The Act purports to grant the executive the power to rule tomorrow that what you did today is unlawful even though there was no

way of knowing it. In theory, the activities of the Dutch East India Company in 1652 could today be declared retroactively unlawful.

Retired UCLA Professor Emeritus, John Hospers, used to use South Africa's consumer affairs law in his jurisprudence course as an exercise for students to identify the contravention of every principle of the rule of law in a single short act.

Similar powers exist under an increasing number of laws such as the Financial Advisory and Intermediary Services Act and the proposed National Credit Bill.

One of the most extreme is the Prevention of Organised Crime Act (POCA), known popularly as the asset forfeiture law. As always, the law was defended with persuasive rhetoric to the effect that abnormal powers are necessary to fight "international organised crime". When rule of law protagonists queried the extraordinary powers in the act, they were told that the government needs to be "tough on crime" – a sentiment shared by almost everyone, which is why there is widespread support for the law. And we were reminded that similar powers exist in the USA. This latter point has become a mantra to legitimise all dubious laws ... as if the United States is our benchmark for what ought to be done during our transitional towards being a mature democracy. This is nearly as bizarre as the tendency to justify dubious things done now on the grounds that they were done under apartheid.

Advocates of the rule of law warned that power corrupts and that powers intended to protect us from large, sophisticated and dangerous crime syndicates would be used against ordinary civilians, which is precisely what's happening. As far as I know the legislation has never been used to seize the assets of international crime syndicates. Instead it is used to take the assets of ordinary innocent civilians.

Consider Mr Kleinbooi, an employee on the Laingsburg Municipality. He is suspected of drunk driving, but not yet convicted, and therefore to be presumed innocent. It turns out that there are many curious facts, such as that blood samples were taken long after his two alleged offences. However, when considering the rule of law it is important not to be diverted from basic principles by context-specific anomalies. The Act purports to give officialdom virtually unbridled arbitrary power to take all or any of any citizen's assets whether or not the person has committed an offence. All your wealth could be seized without you ever having committed an offence, or ever being charged, under conditions that would make it impossible for practical purposes for you to defend yourself.

These are not all the elements of the rule of law; only those that are presently least understood and therefore under greatest threat. There are essentially two ways of addressing the problem, firstly for government to continue enforcing and making laws of dubious constitutionality pending a Constitutional Court ruling, or secondly, to create institutions and a climate of opinion that upholds the rule of law in its full and proper sense as a national value that informs all laws and practices. The problem with leaving it to the Constitutional Court is two-fold. It means that unconstitutional laws will be enforced indefinitely, perhaps for decades. It also presents the Constitutional Court with an intolerable dilemma" it is and should be reluctant to find laws, especially those made in the new South Africa and laws that have already had far-reaching consequences, unconstitutional. It should not be under pressure to compromise the letter and the spirit of the Constitution. The constitutional watchdog function should be performed at the other end of the statutory process, when laws are being conceived – long before they are presented to ministers and the public. To this end we should consider the tendency in mature democracies to have all laws drafted by specially trained experts in a central drafting agency, and subjected to mandatory screening by an antonymous agency. This would be an ideal criterion for peer review under NEPAD.

Finally, it is necessary to respond to what has become popular rhetoric to the effect that individual aspects of the rule of law cannot be upheld absolutely. It is argued, for example, that the separation of powers has to be compromised because in a modern complex world legislators cannot be expected to take responsibility for all the legislation required. This is nonsense. There is no reason why substantive law now being processed as regulations ("subsidiary legislation") shouldn't be presented parliament as part of the Act concerned. Indeed, it is impossible for legislators to make laws in good faith if they do not know what law they are really making because its substance will be in a subsequent regulations never considered by them.

Perhaps more profoundly, the assumption that the world is more complex or that a complex world needs more laws, is mistaken. The "modern world" is primarily in the first world. We are a developing country. The quantity and nature of laws appropriate for our state of development is that which existed in the world's most advanced countries when they were where we are now. We curtail our prospect of catching up to them to the extent that we mimic what they do after their success. Even if we were an advanced democracy, the so called modern world is not more complex. Modernity makes the world increasingly simple and enhances the ability of citizens to cope with it. The fact that they have more education, wealth, technology, civil liberties, civil society, and all the other trappings of modernity, means that their lives are simpler – they work shorter hours, have jobs that are less challenging, have more congenial working conditions, retire earlier, live longer, and have a better quality of life according to every measured index. As the eminent jurist Richard Epstein has observed, modern advanced democracies should be replacing complex laws with simple rules that create unambiguous rights and are readily understood by people to whom they apply.

A presentation by Leon Louw
17 March 2005

Attachment to Free Market Foundation submission on RULE OF LAW

Discretionary powers and the Rule of Law

There is a long history of philosophers, judges, and scholars warning against the granting of discretionary powers to executive arms of government. Increasingly, in South Africa, law and regulation is being determined by civil servants and not by Parliament. The Constitution should prevent Parliament from abdicating its powers and Members of Parliament should be required to maintain vigilant supervision over all laws and regulations that are promulgated. The following excerpts give an indication of the historical roots of this controversy:

In 1624 Sir Edward Coke warned the English Parliament in his *Institutes of the Laws of England* to leave all causes to be measured by the golden and straight mete-wand of the law, and not to the uncertain and crooked cord of discretion."

Though the two meanings of "arbitrary" were long confused, it came to be recognised, as Parliament began to act as arbitrarily as the king, that whether or not an action was arbitrary depended not on the source of the authority but on whether it was in conformity with pre-existing general principles of law. The points most frequently emphasised were that there be no punishment without a previously existing law providing for it, that all statutes should have prospective and not retrospective operation, and that the discretion of all magistrates should be strictly circumscribed by law.

The philosopher John Locke, in his *Second Treatise on Civil Government*, was concerned with the practical problem of how power, whoever exercises it, can be prevented from becoming arbitrary: "Freedom of men under government is to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it; a liberty to follow my own will in all things, where that rule prescribes not: and not to be subject to the inconstant, uncertain, arbitrary will of another man."

Sir William Blackstone, in *Commentaries on the Laws of England* described the importance of the separation of powers: "In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure, by the Crown, consists one main preservative of public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be regulated only by their own opinions, and not by any fundamental principles of law; which, though legislatures may depart from them, yet judges are bound to observe."

The rule of law requires that government should enact only such laws as are general in nature, are applicable to everyone including itself, and which do not attempt to bring about particular outcomes. The rule of law was described by Nobel Laureate Friedrich Hayek in his book *The Constitution of Liberty*:

The conception of freedom under the law ... rests on the contention that when we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man's will and are therefore free. It is because the lawgiver does not know the particular cases to which the rule will apply, and it is

because the judge who will apply them has no choice in drawing the conclusions that follow from the existing body of rules and the particular facts of the case, that it can be said that laws and not men rule. Because the rule is laid down in ignorance of the particular case and no man's will decides the coercion used to enforce it, the law is not arbitrary. This, however, is true only if by "law" we mean the general rules that apply equally to everybody.

Total power became so much a part of previous administrations that the elements of despotism are not recognised by most South Africans, not even by those who suffered most as a result of the bias and discretionary powers contained in legislation. In order to create the free society for which the majority of South Africans have been yearning for so long, it will require a conscious effort on the part of government to root out all provisions of a despotic nature contained in existing legislation. It will also be essential to ensure that no new despotic legislation is added to the statute book.

The infamous apartheid period was only possible because the rule of law was ignored and extensive arbitrary powers were given to the civil service to follow differing rules in dealing with different citizens of the country. The greater part of those arbitrary powers continue to exist and there is clear evidence that the civil service is asking for even greater powers. Citizens need protection against this trend. Two possible methods of affording that protection are:

That the Members of Parliament resolutely refuse to approve any legislation that is not in accordance with the rule of law as described above, and particularly, that they refuse to approve provisions in legislation that grant arbitrary discretionary powers to the civil service.

That the Constitution gives courts the task of reviewing and controlling the acts of the administrative branch of government, especially to ensure that they do not exceed the powers that Parliament intends to grant when approving legislation.

Eustace Davie
FMF Director

Attachment to Free Market Foundation submission on RULE OF LAW

Equality, constitutionality and the rule of law

The aspect of the rule of law usually mentioned first is the doctrine of equality: that laws must be of general application (an explicit requirement of our Constitution) and apply equally to all. For obvious historical reasons our Constitution allows measures to protect and advance people who are disadvantaged as a result of unfair discrimination.

The Constitution does not refer to race or to people who were “historically” disadvantaged. In other words, it applies to people presently disadvantaged regardless of when they were unfairly discriminated against, so the measure could apply in the distant future. A careful reading of the relevant provision raises important jurisprudential questions regarding prevailing practices and policies many of which may be per se violations of the foundational rule of law requirement of equality, without necessarily being legitimised by the exception.

Understandably, there is a propensity to presuppose that the equality requirement of the Constitution refers to racial equality, that targeted discrimination is racial. The challenge to the rule of law of this interpretation is that equality in other senses may be compromised. There are many examples. Most South African legislation and regulation is from the past. There have, for instance, been about 1,000 new acts of parliament since 1994 while there are over 3,000 acts still in force. Much if not most pre-transition legislation contains provisions inconsistent with the rule of law. Many post-transition laws also reflect a lack of appreciation of, or respect for, the rule of law because of the extent to which the pre-transition mindset survives amongst all concerned with law-making: including legislators, government officials, judges and magistrates, lawyers, NGOs, and representatives of civil society (organised business and labour in particular).

A seminal example that bridges the past with the present is the Consumer Affairs (Unfair Business Practices) Act. It is a reincarnation of the harmful Business Practices Act. Like its predecessor, the new Consumer Affairs Act has extraordinary provisions. It purports to permit the executive branch of government to ban virtually any business practice, which is so broadly defined as to include almost anything anyone does in pursuit of income. Some formalities are prescribed but they are nothing like what is required of the legislature should it wish to ban a business practice. In other words, the Act purports to give the executive more law-making discretion than the legislature enjoys under the Constitution.

The Consumer Affairs Act purports to grant the executive an unbridled right to discriminate, a right that is exercised routinely. The net effect is that the executive makes substantive laws, applies them arbitrarily to individual businesses or people (instead of generally to all people), and undertakes quasi-judicial proceedings amounting to a usurpation of the judicial function. Whilst it is required to follow some aspects of the rule of law requirement of due process, it need not and does not comply with the high standards taken for granted in the judiciary, where people have the right to know who their accusers are, of what they are accused, what law it is they are supposed to have violated, the right of access to all relevant information, the right to be present, the right to cross examination, the right of review and appeal, and so on, none of which is applicable to proceedings under the Act.

A derivative of the requirement of legal certainty, the right to know the law, is that laws should not be retroactive. Retroactive legislation is obviously inconsistent with the rule of law. If citizens cannot know at the time of doing something whether it is lawful they are not being ruled by the law. The Act purports to grant the executive the power to decide tomorrow that what you did today is unlawful even though it was lawful at the time when you did it. To use an extreme example, if retroactive legislation was to be considered legitimate law, the activities of the Dutch East India Company in 1652 could today be declared retroactively unlawful.

When he was still teaching, retired UCLA Professor Emeritus, John Hospers, used South Africa's consumer affairs law in his jurisprudence course as an exercise for students to identify the contravention of every principle of the rule of law in a single short act.

Similar powers that are in conflict with the rule of law exist under an increasing number of statutes, including the Financial Advisory and Intermediary Services Act and the proposed National Credit Bill. One of the most extreme is the Prevention of Organised Crime Act (POCA), known popularly as the asset forfeiture law. As always, the law was defended with persuasive rhetoric to the effect that abnormal powers are necessary to fight "international organised crime". When rule of law protagonists queried the extraordinary powers in the act, they were told that the government needs to be "tough on crime", a sentiment shared by almost everyone, which is why there is widespread support for the law. We were reminded during the debate that similar powers exist in the USA, which supposedly legitimises all dubious laws on the basis that the United States is our benchmark for what ought to be done during our transition towards being a mature democracy. This is nearly as bizarre as an attempt to justify dubious things done now on the grounds that they were done under apartheid.

Advocates of the rule of law warned that power corrupts and that powers intended to protect us from large, sophisticated and dangerous crime syndicates would be used against ordinary civilians, which is precisely what is happening. The legislation has to my knowledge never been used to seize the assets of international crime syndicates. Instead it is used to take the assets of ordinary civilians. The Act purports to give officialdom virtually unbridled arbitrary power to take all or any of any citizen's assets whether or not the person has committed an offence. All your wealth could be seized without your ever having committed an offence, or ever being charged, making it impossible for you to hire lawyers for your defence.

There are essentially two ways of addressing the problem of ensuring that South Africa's statutes comply with the rule of law and the Constitution. Firstly, government can continue to enforce and make laws of dubious constitutionality pending a Constitutional Court ruling. Or secondly, it can create institutions and a climate of opinion that upholds the rule of law in its full and proper sense as a national value that informs all laws and practices.

One of the problems with leaving it to the Constitutional Court to strike down unconstitutional laws is that they may be in place and enforced for decades before they are challenged. It also places the Constitutional Court in the intolerable position of having, perhaps regularly, to find laws made in the new South Africa unconstitutional. The Court should be reluctant to do so, which is all the more reason why it should not be placed in an invidious position. It should not find itself under undue political pressure to compromise the letter and the spirit of the Constitution.

The constitutional watchdog function should preferably be performed at the other end of the statutory process, when laws are being conceived, long before they are presented to ministers and the public. The government should therefore consider adopting the procedure, now increasingly followed in mature democracies, of having all laws drafted by specially trained experts in a central drafting agency, and then subjecting them to mandatory screening by an autonomous agency. This would be an ideal criterion for peer review under NEPAD.

Finally, it is necessary to respond to the contention that individual aspects of the rule of law cannot be upheld absolutely. It is argued, for example, that the separation of powers has to be compromised because in a modern complex world, legislators cannot be expected to take responsibility for all the legislation required. This is nonsense. There is no reason why substantive law now being processed as regulations ("subsidiary legislation") should not be presented to parliament as part of the proposed legislation. Indeed, it is impossible for legislators to adopt a law in good faith if they do not know what law they are really making because its substance is to be in regulations subsequently prepared and never considered by them.

The eminent jurist Richard Epstein has observed that modern advanced democracies should be replacing complex laws with simple rules that create unambiguous rights and are readily understood by people to whom they apply. The simple rules that Epstein considers desirable for advanced democracies are even more necessary in our developing democracy. South Africans deserve to be governed by laws that are constitutional, of general application and equally applicable to all, comply with the rule of law, and simple enough for everyone to understand and comply with.

Leon Louw
FMF Executive Director

Attachment to Free Market Foundation submission on RULE OF LAW

South Africa is buckling under excessive regulation (published 2004)

Of all the obvious things about regulation, that we are overregulated is the most obvious. Not only is most of the regulatory residue of the control-obsessed apartheid regime still with us, but we've added almost 2,000 new acts since 1994, along with hundreds if not thousands of provincial laws and municipal bylaws, and countless regulations (subordinate legislation). There are so many new laws, they are so complicated and counterintuitive, and so few people know what's in them, that there is an entire new profession of compliance officers whose sole job is to help companies comply with the deluge of new laws. Hundreds of millions of rands of additional costs are passed on to consumers as these new professionals help companies avoid prosecution and damages actions for noncompliance.

Many of our laws are formulated by sending civil servants on costly missions to the world's most advanced countries, not to ask what they did to develop and prosper, but to mimic their post-development regulatory excesses. Our regulators often compound matters by embellishing First World regulations, thus rendering them maximally unsuitable for our development needs.

Our company laws, for instance, have become a nightmare of complex regulation, one effect of which is that private companies are no longer private and investors in public companies are lulled into thinking risk-taking isn't risky. Registering a new company in Canada takes 2 procedures, 2 days and costs the equivalent of 1.5% of per capita GDP, compared with 7 procedures, 30 days and 37% of per capita GDP in South Africa. The *Economic Freedom of the World Index* shows most economies getting freer, including ours*, but a frightening growth in regulation, especially since 9/11. The general regulation index for South Africa deteriorated from 6.6 to 5.4 (where 10 is free and 0 unfree) from 2000 to 2002. Regulation of new business plummeted from 6.9 to a stifling 3.3, and time spent with bureaucracy deteriorated from 6.5 to 5.3.

Mercifully, it's not all bad news. The ANC got off to a good start by deregulating agriculture, privatising or liquidating control boards, and ending subsidies, to give us the world's freest market in agriculture. Road freight and airlines were deregulated. Land development and tenure upgrade were streamlined. Low-income housing was liberalised and outsourced. Most profoundly, GEAR and NEPAD were adopted, committing the country to the rule of law, property rights and a market economy.

COSATU says GEAR should be abandoned because it failed to deliver jobs and growth. In truth, the government failed to implement it purposefully. It allowed bureaucracy to run amok. If we are to go from neutral to first and eventually to top GEAR, and get off our NEPAD knees, government will have to walk its talk. It must reverse the tidal wave of regulatory excess. It resolutely withstood resistance from its alliance partners on the fundamentals of its policies but unless it now implements them, its valiant stand on principle will have been futile.

The case for the tidal wave of new laws does not stand up to scrutiny. Ask the Financial Services Board (FSB) why it introduced the *Financial Advisory and Intermediary Services Act* (FAIS), and they say: Because financial services were unregulated. Why do we have the taxi tax-and-spend recapitalisation plan? Well, because the industry is unregulated. The supposed need for regulation is parroted as if its mere absence constitutes an obvious need for it.

The first thing to understand is that everything significant has been regulated for centuries by common law. And there are thousands of additional laws governing everything under the sun. Without adding FAIS, there are banking and lending laws, fraud and contract laws, insurance and disclosure laws, and much more. Without the taxi recap, there are vehicle licensing and roadworthy laws, road traffic and public liability laws, drivers licence and contract laws and much more.

Even so, whilst you read, your taxes are being squandered on an endless quest for more things to regulate more resulting in an increasingly incomprehensible web of overlapping, often contradictory laws, some forgotten before they can be implemented. Often more than one department unwittingly regulates the same activity. In their zeal for things to regulate, regulators often regulate the same thing twice or thrice, like trade coupons.

If you ask for what specific mischief new laws are supposed to curtail, you are usually told about something that is already a crime or delict, like fraud or breach of contract. If you persist, and ask what's wrong with common law, you get the most important answer of all: *it is too hard to enforce common law rights and prosecute common crimes.*

Dig deep enough and you find no need for new laws, only for old ones to be enforced. In other words, you find the real problem is an inadequate justice system. The *justice system* turns out to be the problem. Making more laws compounds the problem because it places extra demands on a failed system.

An OECD study found that overregulation is *the* major cause of EU growth being slower than USA growth. But what are the benefits of regulation? The study found no quality benefits. We all know that government is costly, but a 75-country study found that regulations usually cost a country twenty times more than they cost the government.

In the face of mounting anti-regulation evidence, the UK passed the Deregulation Act (now the Regulatory Impact Assessment Act), created the Better Regulation Task Force, and has adopted a new Regulatory Reform Bill. The Bill will, for instance, simplify unnecessarily complicated rules and allow partnerships of more than 20 people.

With overwhelming evidence that we and the world are overregulated and moving the wrong way, and with our commitments to GEAR and NEPAD, it is time for a *zero-based regulation policy* (ZEBREP), according to which no regulation is presumed justified merely because it exists or because something is supposedly unregulated. All existing laws and regulations should be re-evaluated and superfluous ones should be scrapped. In addition, we should adopt measures to halt the proliferation of regulations usually instigated by special interests that are costly to implement, are accompanied by impoverishing compliance costs, and retard economic growth.

All resources now wasted on excess laws and regulations should be left with original owners so they can produce more wealth, while enough of the savings resulting from ZEBREP should be kept for an enhanced, expeditious and affordable court and police service. An efficient and effective justice system would be highly beneficial from numerous perspectives, not least of which would be to prevent us all from being smothered in red tape.

Leon Louw
Executive Director, FMF

* The *Economic Freedom of the World Index* is co-published annually by the Free Market Foundation in conjunction with Canada's Fraser Institute.

Last year South Africa ranked 96 out of 157 countries included in the Index; in 2014, South Africa ranked 89; in 2000 South Africa ranked 42.

The report, which is based on data from 2013 (the most recent year available), measures the economic freedom (levels of personal choice, ability to enter markets, security of privately owned property, rule of law, etc) by analysing the policies and institutions of 157 countries and territories.

Hong Kong again topped the 2015 index, continuing its streak of number one rankings, followed by Singapore, New Zealand, Switzerland, United Arab Emirates, Mauritius, Jordan, Ireland, Canada, and the United Kingdom and Chile tied for 10th.

The 10 lowest-ranked countries were Angola, Central African Republic, Zimbabwe, Algeria, Argentina, Syria, Chad, Libya, Republic of Congo, and Venezuela. Some despotic countries such as North Korea and Cuba can't be ranked due to lack of data.

Globally, the average economic freedom score rose slightly to 6.86 out of 10 from 6.84 the previous year.

According to research in top peer-reviewed journals, people living in countries with high levels of economic freedom enjoy greater prosperity, more political and civil liberties, and longer lives. Moreover, the average income in 2013 of the poorest 10 per cent in the most economically free countries (US\$9,881) dwarfed the overall average income in the least free countries (US\$1,629). And life expectancy is 80.1 years in the top quartile of countries compared to 63.1 years in the bottom quartile.

There were declines in South Africa's ratings for four of the five key components of economic freedom and one positive change, which was in the area of sound money (scores range from 1 to 10 where a higher value indicates a higher level of economic freedom):

- Size of government: changed to 5.53 from 5.54
- Legal system and property rights: changed to 5.81 from 5.92
- Access to sound money: changed to 8.17 from 8.10
- Freedom to trade internationally: changed to 7.03 from 7.20
- Regulation of credit, labour and business: changed to 7.15 from 7.10