



HELENSUZMAN FOUNDATION

REPORT TO DONORS ON THE ACTIVITIES OF THE FOUNDATION

August 2019

1. Introduction

I am pleased to report that both the financial position of the Foundation (HSF) and its staffing remain stable. We are grateful to our existing donor base for their support and continue our pursuit of new sources of funding.

Since the National and Provincial elections in May 2019 the ruling party is in disarray with contradictory signals coming from the Union Buildings and Luthuli House. We now face a situation of policy incoherence.

The state of our public institutions is also a matter for grave concern, whilst the policing agencies, the prosecutorial agencies, SARS and the Treasury continue to struggle. Likewise, those ministries tasked with education, healthcare and the provision of low-cost housing remain as dysfunctional now as they have been over the last decade or longer. We are particularly concerned about what is best described as the erratic behaviour, if not the unconstitutional behaviour, emerging from the office of the Public Protector.

In the light of this bleak picture of the challenges that South Africa faces, I am more persuaded than ever that the role of civil society is crucial in arresting the downward trajectory which our state and society is embarked upon.

2. Objectives

The work of the HSF is driven by the principles that informed Helen Suzman's public life.

These principles are:

- informed and reasoned discourse;
- fairness and equity;
- the protection of human rights; and
- the promotion of the rule of law and the Constitution

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The HSF is **not** aligned to any political party and will actively engage with a wide range of people and organisations, to have a constructive influence on the country's emerging democracy.

The HSF seeks to publish research on topical issues and to create a platform for public debate and dialogue through publications, roundtable discussions and conferences. It maintains an internship programme for young graduates in economics, political science and law, which at the same time allows it to grow its research capability and profile in these fields.

Where appropriate, legal interventions are made in the public interest in carefully selected cases.

3. General activities of the HSF

The HSF's activities focus on the following:

- the publication of own research on topical social, economic and legal issues;
- media interviews, following publication of research material or on subjects where the HSF is well known as an informed independent commentator;
- the holding of seminars and roundtable discussions on topical issues;
- the holding annually in November of the Helen Suzman Memorial Lecture;
- direct contact with State authorities in respect of wrong or unlawful actions;
- public interest litigation aimed at strengthening the rule of law and ensuring accountability by Government, not only to correct wrongdoing in individual cases, but with the broader overall intention of ensuring the integrity of official institutions; and
- the preparation of submissions to Parliament and Government Departments on constitutional issues and impending legislation.

4. Specific areas of activity

The work of the HSF in litigation, research, policy, advocacy and training in public interest law is stated below under the various headings.

LITIGATION

Judicial Services Commission (JSC)

The question that arose in an application for a review of a JSC decision is whether the JSC is compelled to release the full recording of its deliberations on the appointment of judges. The HSF argued that the JSC is obliged to disclose

all relevant information regarding its decision, including the recorded deliberations. After the HSF's application had been dismissed by the Western Cape High Court and the Supreme Court of Appeal, the Constitutional Court decided in favour of the HSF in April 2018. As a result of the wide-ranging effect of this decision on the duty of official entities to provide a full record of its decisions in review proceedings, it is regarded as a landmark decision.

Eskom

Following the Public Protector's report into state capture (released towards the end of 2016), it has emerged that certain state-owned enterprises have been repurposed to serve the private interests of a small powerful elite. Evidence of state capture is most clearly evident in state-owned enterprises, and in particular the state-owned electricity utility, Eskom. As a result of inaction by the State's criminal justice authorities, the HSF decided in December 2017, in the public interest, to launch an application to set aside a series of unlawful and corrupt exercises of public power by Eskom and to recover the proceeds of this activity, totaling several billion Rand. In order to obtain all documentation that is relevant to this litigation with Eskom, the HSF has also commenced proceedings for the discovery of documents against the Bank of Baroda. These cases are proceeding.

Renewal Process of Executive Director of the Independent Police Investigative Directorate(IPID)

In terms of the IPID Act, the head of IPID serves for a term of five years, which is renewable for one additional term – without mentioning who is required to make a decision on such renewal. The Minister of Police, the Portfolio Committee for Police in Parliament and the head of IPID entered into an agreement which authorised a process by which the Minister is permitted to make a “preliminary decision” regarding the renewal of the term of office of the Executive Director of IPID, and which the Portfolio Committee then confirms or rejects. This agreement was rubber stamped as an order of court, but the HSF (who acted in the role of *amicus curiae* in the court proceedings) has decided to take this on appeal. This is based on repeated rulings by the Constitutional Court that political actors are not permitted to involve themselves in decisions regarding the renewal of a term of office of persons who by the very nature of their post, need to be independent from Government. The HSF's appeal is before the Supreme Court of Appeal.

Public Protector – Letter to the Speaker

Following the Constitutional Court's judgment of 22 July 2019 on the Public Protector being liable for 15% of the costs in a case involving the SA Reserve Bank, we sent a detailed letter (via our lawyers) to the Speaker of the National

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Assembly on 26 July 2019. In this letter, we requested that she sets the Parliamentary process in motion, as a matter of urgency, to remove the Public Protector from office, on the grounds of her grossly unreasonable conduct and that she was found to have acted in bad faith. Our press release and the letter received widespread media coverage.

RESEARCH

The HSF research is published on its website as follows:

Focus

The following editions of Focus have been published in the past 12 months:

- Focus 83: On Land (published 7 December 2018).
- Focus 84: The Changing International Order – Fault Lines (published 4 June 2019).
- Focus 85: The Changing International Order – Emerging Powers (published 18 June 2019).

Briefs

Briefs are aimed at a generalist audience and written in a manner that does not require specialised knowledge of the subject. They provide analyses of topical issues in more depth than may be found in the media, are distributed to the HSF's database and can be found on the HSF website. All HSF research is published by *Politicsweb* on its website and other media agents such as *Daily Maverick* and *Moneyweb*.

All briefs are available on the HSF website and those published since December 2018 are attached to this report as Annexure A.

Special Publications

The following special publications were produced in the period under review and are available on the HSF website:

- Human Settlements and Urban Land Reform (June 2018)
- Criminal Justice System: Radical reform required to purge political interference (14 December 2018)
- South Africa's foreign policy and the Constitution (19 March 2019)

Government Monitoring & Accountability Project

The HSF will be dedicating a substantial portion of its research capacity and time to this project which aims to broaden and deepen knowledge about systems that

can prevent corruption and facilitate the prosecution of offenders. We see the educational aspect of this project as extremely important. While the South African public has become disillusioned with Government behaviour over the past decade, it is often not aware of what is available to improve the state's accountability.

Deepening Democracy

South Africa's constitutional democracy is under severe strain. Nevertheless possibilities remain for deepening it. Central to this is the relationship between citizens and each of the three levels of the legislature: the National Assembly, provincial legislatures and municipal councils. The issues arise both in connection with elections and the ongoing relationship between citizens and legislatures between elections. This research will explore: electoral reform and multi-party constituencies, the role of MPs in constituency offices, public participation vehicles such as petitions, and improving the functioning of the legislature. Bills regarding Traditional Leadership will also be included.

The Economy

Through its research, the HSF provides an ongoing analysis on the state of the South African economy. We aim to tailor our policy recommendations to offer advice and chart the way in favour of a macro-economic policy that enhances growth.

Eskom and the National Energy Regulator (NERSA)

The HSF has published detailed research on Eskom and South Africa's energy policies since 2016 and has made regular presentations at NERSA's public hearings in connection with Eskom's requested electricity tariff increases. Eskom is of particular importance and interest in its position as a state-owned electricity utility that enjoys a monopoly, not only because of its critical financial situation, but also as a result of the extensive corruption and mismanagement that has been taken place within it.

Health

This focus area has its background in the HSF's historic interest in strategic health reform generally, and in the proposed National Health Insurance (NHI). The HSF's concerns relate to whether the South African Government has the funds, as well as the institutional capacity, to implement such a project. We are particularly concerned about the deteriorating quality of the public health system and dramatic increases in costs in the private health sector. Earlier, the HSF completed major studies dealing with pharmaceutical production and distribution.



NHI Social Compact process

The HSF has taken a lead role in the facilitation of a “Social Compact” around strategic health reform, incorporating various parties (including the private and public sectors), with a view to providing a platform for an effective policy discussion with Government. The aim of such a platform is to ensure that Government policy is able to focus on what is realistically achievable.

Land Reform

The HSF has engaged extensively in the public debate since 2018 concerning land reform, both through research briefs and the public participation processes. This has included both written and oral submissions to the Parliamentary Committee, during the public consultation phase on whether the Constitution needs to be amended to enable expropriation without compensation. Our position is that it does not need to be amended.

In order to avoid arbitrary, corrupt or incompetent conduct in the implementation of a land reform policy, the HSF argues that a clear legislative and administrative framework, together with a properly resourced Government institution to manage the process, has to be put in place. If this is not done, any expropriation policy will confront insurmountable problems. We have also made a submission to this effect to Government on the Expropriation Bill in 2019.

Water management

Appropriate water management is essential to the functioning of any society. Unfortunately, South Africa’s water management systems are in dire straits – a combination of infrastructural decay, poor management and corruption. The HSF has embarked on a 2 year project to address some of these issues, including the quality of the water which is piped to its citizens. This is a funded project.

POLICY

Competition Amendment Bill

The HSF made written submissions and presentations at public hearings in response to the Portfolio Committee on Economic Development’s call for public comment on the Competition Amendment Bill, 2018. The Bill seeks to address high levels of concentration and the skewed ownership profile of the economy. It also attempts to enhance the administrative efficiency of the Competition Commission and Tribunal. The HSF’s submission was confined to comments relating to the impracticality of new draft provisions which introduce national

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security as an issue to be considered before permitting large acquisitions by foreign firms.

Companies Amendment Act Bill

The HSF proposed an amendment to the Companies Act in order to facilitate access to information about the beneficial ownership of shares of private companies, specifically to make it more difficult to hide corrupt and illegal activities. This would be in line with the practice in various other jurisdictions, including Singapore, New Zealand, India, and the United Kingdom. The HSF continues to monitor the legislative path of this Bill and provide analysis and comment.

IPID Amendment Bill

The HSF has a longstanding interest in the independence of policing institutions, following its appearance as *amicus curiae* in the Constitutional Court in 2016 (*McBride v Minister of Police*), as a result of which the Court ordered the IPID Act to be amended. The HSF participated in the subsequent public consultation process and we urged both the relevant Parliamentary Portfolio Committees also to consider broader amendments to the Bill in order to grant IPID the requisite degree of structural and operational independence, as required by the Constitutional Court. The Bill will be revived in Parliament after the May 2019 elections and we will continue to follow and participate in this legislative process.

Hate Speech Bill

The HSF made submissions to Parliament on the Hate Speech Bill in 2019, since it infringes on the freedom of expression and the principle of free speech. The Bill attempts to present a solution to the scourge of racism through the imposition of penalties. Our position is that this is legally inappropriate intervention. We continue to monitor the progress of this draft legislation.

Civil Union Amendment Bill

The Civil Union Amendment Act of 2018 repealed the provision permitting a civil servant to refuse to solemnise a marriage between persons of the same sex on grounds of religion or conscience. The HSF's submission went beyond the scope of the Bill and proposed that the legal framework governing marriage in South Africa be re-evaluated and legislation be consolidated to deal with civil unions, marriages between opposite-sex couples, customary marriages and Muslim marriages. This was not accommodated in the legislation, but the HSF will continue its involvement with a view to the amendment of legislation which regulates marriage regimes in South Africa.



PIC Amendment Bill

In its published research, the HSF has been calling on the PIC for regular disclosures of all the PIC's investment holdings. The PIC Bill contains such an amendment, but falls short in other areas, which the HSF has raised in its submission on the Bill. Our research strongly supports the case that it is appropriate for the PIC's depositors to make nominations to the Minister regarding the appointment of board members of the PIC. In addition, the HSF has also proposed that provision be made for the mandatory disclosure of all investment expenses (including those relating to consultant and professional services), against the background of allegations of large fees being paid to outside consultants who are seen to enjoy privileged positions. The HSF will continue to monitor and to comment on legislation regarding the PIC. We have made a submission to the Judicial Commission of Inquiry into the PIC.

ADVOCACY

Commission of Inquiry into State Capture

The HSF has submitted an affidavit to assist the Commission of Inquiry into State Capture regarding its personal experience of the capture of the criminal justice system. The Commission is proceeding and the HSF expects to be called to give evidence in this regard. It may be noted that the rules governing this Commission were amended as a result of the intervention by the HSF: except for self-incriminatory evidence, all evidence before the Commission may now be used in subsequent criminal proceedings. The original rules excluded all evidence before the Commission from such proceedings.

Criminal Justice Reform

Following the release of a special publication by the HSF on the reform of the appointment procedures of persons who are crucial for the proper operation of the criminal justice system, the HSF has convened a public roundtable on these questions.

Roundtable on the Criminal Justice Institutions

The HSF will hold a roundtable on the Criminal Justice: Independence and Accountability in August 2019.

PROPOSED INSTITUTIONAL AND RESEARCH DEVELOPMENTS

We are currently seeking resources for the following two initiatives:



Training in Public Interest Law

The HSF intends providing on-the-job-training to young graduates in the field of public interest law. The intention is to appoint young black graduates who have not been able to obtain articles at any of the established firms of attorneys. The costs of the programme will cover the cost of time spent by existing legal staff (who have substantial experience in this field), an increase in normal operating costs, the costs of attendance at outside lectures/conferences and a limited stipend nor each appointment.

Economic Reconstruction and Growth

South Africa is faced with the problems of collapsing infrastructure, serious finance constraints and very slow economic growth. The political will to deal with them has been conspicuous by its absence in the last few years. A clear programme of reform is needed to address this situation. The HSF is keen to contribute to such a programme. We will continue with our research on this subject and will intervene in the public debate and in the formulation of policy where possible.

5. Conclusion

It is inevitable that a degree of despondency informs much of the commentary on State and Society. This is perfectly understandable; but this despondency can become a self-fulfilling prophecy unless we are able to galvanize support from those institutions in civil society who are prepared to speak out against the abuse of power. We need to tackle corruption and thereby offer a way forward for our country in this difficult time.

We are proud of the record of the Helen Suzman Foundation over the last few years in supporting the rule of law and constitutional democracy and we urge donors to continue to support us in our endeavors.

Francis Antonie
DIRECTOR