

THE DISCLOSURE OF FOREIGN FUNDING ACT - CURRENT DEVELOPMENTS

Memorandum prepared as a basis for discussion on 13th November 1989 in Johannesburg.

The purpose of this consultation is not to go into the details of the Act as these are well known to the participants. Annexure 1 from the law firm Cheadle Thompson and Haysom addressed to the Kagiso Trust will suffice to refresh our memories if necessary.

Our purpose is to consider the application of the Act as it is occurring at the moment and our responses thereto.

1. The current situation.

A Registrar of Reporting Organisations and Persons was appointed and, apparently even before he had an office, certainly before Regulations in terms of the Act were published in Government Gazette No.12063 on 25th August 1989, he wrote on 22nd August to four organisations - Kagiso Trust, Wilgespruit Fellowship Centre, the End Conscription Campaign and IDASA.

These organisations are all part of what may be described as the extra-parliamentary opposition to the policies of the National Party government but are otherwise dissimilar in the work they do and the way in which they do it. It seems the Registrar chose these organisations to test the response from different constituencies.

Kagiso is a Trust which funds many different projects and programmes of an educational, developmental and political nature which are all in some way or another designed to further the dismantling of apartheid. This is in accordance with the desires and purpose of the donors.

Wilgespruit is a church organisation and is a member organisation of the South African Council of Churches. It runs a wide variety of educational, training and development programmes.

The ECC is a single issue organisation which has been restricted in terms of the State of Emergency Regulations and which worked to end the current system of military conscription in South Africa.

IDASA was formed to promote constitutional and political debate between South Africans inside and outside the country across a wide spectrum of political opinions.

These four organisations each received letters from the Registrar saying that consideration is being given to declaring them to be Reporting Organisations and implying that he was acting in the interests of the donors to ensure that their funds are not being misappropriated or utilised for purposes other than that intended by the donors. (Annexure 2)

Through their attorneys the organisations asked the Registrar for clarification of his letter and for an extension of time to enable them to formulate their response. The Registrar replied by agreeing to an extension of one month and completely reversing his position: (Annexure 3)

"6. The reference in my letter dated 22 August 1989 to misappropriation, unauthorised spending and other irregularities should not be read to mean that your client is suspected of being guilty of such conduct. In fact, as appears from the contents of paragraph 5 above, such considerations would in any event be immaterial to the question whether or not an organisation should be declared to be a reporting organisation."

The Registrar, and hence the State, has contradicted its original motivation for wanting to declare the organisations as reporting organisations. It is obvious that this occurred because the organisations challenged the whole basis of the original letter which implied that the State was only interested in preventing misappropriation, irregular use of funds, in preventing corruption, and generally safeguarding the Donors' funds.

(In any event it is not necessary for the State to use the Foreign Funding Act to prevent corruption and misappropriation. Sufficient mechanisms exist in normal law to provide for criminal investigation of financial wrongdoing. Donors also require strict control of monies given, with proper financial and narrative reporting in terms of contracts entered into between them and receiving organisations.)

When the donors made it clear that it is not necessary for the State to intervene to safeguard their funds the State recanted this stated intention and introduced a new element, as set out in the second letter and quoted below.

It is our interpretation that the State had hoped that we and our donors would accept this seemingly innocent and legalistic reason for wanting to declare us to be Reporting Organisations and so implement its political agenda vis-a-vis this Act without much fuss.

Our response and the intervention of our donors forced the State to declare its political purpose. This political purpose is set out in the reply to the Consulate General of Japan from the Department of Foreign Affairs dated 26th October 1989 (annexure 4) as well as in the second letter.

2. The disclosure of Foreign Funding Act compared to the U.S. Foreign Agents Registration Act.

Before moving on to the political purpose of the South African government it is as well to clear out of the way the statement on page 2 of the note to the Consulate General of Japan:

"It should be noted that the broad concept of this Act is not

substantially different to the principles underlying the Foreign Agents Registration Act, 1938 (as amended) of the United States of America."

This claim has been comprehensively and authoritatively refuted in the documents furnished by the Embassy of the United States (annexures 5 and 6) We draw your attention to the conclusion in Annexure 5:

"The differences are fundamental. The FFB and the FARA are fundamentally dissimilar in their purposes. They are different in the scope, number and characteristics of those affected. They differ in the predictability of the process by which organisations or persons become subject to their terms. They differ in the means by which they may be enforced. They differ in the degree of intent and kinds of actions which may result in prosecution. They differ, finally, in the penalties and consequences, direct and indirect, resulting from breaching their terms."

3. The history of the legislation:

The political purpose of the legislation may be traced through its history.

The Fund-Raising Act No.107 of 1978 conferred wide powers for the control of organisations on the Director of Fund Raising and the Minister of Social Welfare and Pensions.

Opinions vary as to what extent this legislation was politically motivated but it certainly made the raising of money much more difficult for extra-parliamentary opposition organisations and, in recent years, many of these organisations have been investigated in terms of this Act. The investigations have involved the searching of premises and the removal of financial documents.

Some prosecutions have been instituted.

Tax laws are currently being used to investigate the financial affairs of a wide variety of organisations. Some Trusts have suddenly had their tax exemptions withdrawn without notice by the Receiver of Revenue and may become liable for large amounts of tax in respect of the years during which they were exempted. Church organisations, including Wilgespruit, have also been subjected to these enquiries. This is obviously a very serious matter for all organisations which are dependent upon donors for their financial viability.

The Receiver's investigations have also been a way of collecting information about the work of organisations.

The Promotion of Orderly Internal Politics Bill had a frankly political purpose in its intention to prohibit the receipt or importation of money from outside the country which was intended to be used or could be used "to further, propogate, pursue or

oppose any political aim or object."

Following an internal and international outcry and considerable pressure the government withdrew the Bill.

The present Act is its successor and is designed to accomplish the purposes of the Bill it replaces.

4. The political purpose of the legislation.

The purpose of the Act is to cripple, restrict, and possibly prevent altogether, the work of extra-parliamentary organisations which are opposed to government policies and which are committed to the dismantling of apartheid, under the guise of being concerned only with financial accountability.

This interpretation of the political purpose is born out by the nature of the first four organisations selected by the Registrar for his attention.

The purpose of the Act is to gather information about the work of opposition organisations and the people who are involved in them.

The second letter from the Registrar reads:

"3. This is to confirm that your client will be allowed a further period of one month after receipt of this letter to submit information and reasons to be taken into account when it is considered whether they should be declared to be a reporting organisation."

The registrar appears to be putting the cart before the horse here. He is only entitled to demand information after he has declared an organisation to be reporting.

"4. I am in receipt of information to the effect that your client has in the past received substantial amounts of money from donors in other countries and will in all probability continue to receive such donations in future. This appears to be common cause."

It is indeed common cause and a matter of public knowledge. There has never been any secrecy about monies given for work in South Africa either in South Africa or in the countries of origin of the money.

It needs to be stressed that all foreign money has already to be reported to the Reserve Bank as it is received in South Africa and the standard "E" form has to be filled in and signed at a Bank before the money is deposited in an account. The form requires the amount of money, the supplier of the money and the purpose for which it is received.

Many Trust funds such as Kagiso are also obliged to submit audited accounts to the Master of the Supreme Court should he

call upon them to do so.

Church accounts are considered by large numbers of people at Assemblies, Synods and National Conferences.

Secular accounts are presented to Annual General Meetings and financial management is subject to the scrutiny of members.

Audited accounts are submitted to donors and to serious and honest enquirers. There is nothing secretive about them or the sources of money or its use, as is implied by the Registrar's use of the term "common cause", which is more normally understood by lay persons to be part of the system of accusation and admission in courts of law.

"5. The criteria that will be applied when the matter is considered are the following:

(a) The right and need of the South African Parliament to be informed about the receipt of money from outside South Africa, the purpose for which the money is received and how the money is utilised.

(b) The implications which declaration to be a reporting organisation will have for a particular organisation.

(c) The amounts received and which will probably be received in future."

We do not need to concern ourselves with (b) and (c) which are foolish and almost incomprehensible.

5. The right of the South African Parliament to be informed.....

5.1. One could wish that the right of the Parliament to be informed had been respected by the Ministers of the present government who have over the years consistently refused to answer certain Parliamentary questions when such answers would clearly be in the public interest. Parliament itself has passed legislation which denies the right of the public to know what the State is doing. The Parliament has condoned the use of Executive powers to deny it its right to be informed.

This government does not respect the right of the public to know and the only right which any Parliament has to be informed is the right of the public to know those things which are in the public interest.

The South African government has denied the public the right to know what is of public interest through its statutory controls on the press and the Emergency media regulations.

5.2. The South African government operates in secrecy and the Parliament has authorised the invasion of the privacy of individuals and organisations by phone tapping, interference with

post, the operations of the security police etc. The findings of such operations are never reported to the Parliament and thus to the public unless it is in the political interests of the ruling political party for disclosures to be made public.

This Act is just another example of the invasion of the privacy of lawful organisations, and persons, by the State.

5.3. Whatever the debates about the limitations on the Parliament's, and thus the public's, right to be informed in democratic countries the arguments are irrelevant in South Africa.

The South African government is an illegitimate government and is therefore not entitled to be informed about the activities of its opposition.

5.4. The South African Parliament represents only minority groups in the society. 73% of the population is excluded from participation because it is excluded from the franchise for the central structures of power.

The Disclosure of Foreign Funding Act thus must be seen as an instrument of minority political interests to gain information about, and to control, the activities of the legitimate majority opposition.

The arguments about the moral and theological illegitimacy of the South African government, together with a summary of the evolving understanding of illegitimacy in international law are contained in Annexure 7.

6. Conclusion.

Extra-parliamentary political activity and organisation to preserve and protect human rights is a moral obligation on the citizens of any country - however democratic its constitutional ordering may be.

In South Africa this obligation is the more pressing for as long as the majority of the people are excluded from participation in a democratic constitutional and political system.

Our purpose and the purpose of our donors is to further organisational, educational and developmental work which is designed to dismantle apartheid and to contribute towards the establishing of a just and democratic future for the people of this country.

The Disclosure of Foreign Funding Act is designed to prevent and restrict such work in the interests of the ruling political party. It has nothing to do with the right of Parliament to be informed but everything to do with the furthering of that party's political interests.

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