SAKELIGA

SELFSTANDIGE SAKEGEMEENSKAP

12 March 2021

TO:	Legal Practice Council, Steering Committee, and others to whom it may concern
ATTENTION:	Legal Practice Council, Steering Committee, and others to whom it may concern
DELIVERED:	By email: legalsectorcode@lpc.org.za

To whom it may concern,

SUBMISSIONS: LEGAL SECTOR CODE, 2021

Overview

Sakeliga NPC takes this opportunity to comment on the Legal Sector Code, 2021.

This document consists of Sakeliga's comment, an expert submission, and various addenda. The addenda provide supporting arguments for the main comment and expert submission.

Should the opportunity arise, Sakeliga would wish to offer an oral submission.

About Sakeliga

Sakeliga (Business League) is a business group and public benefit organisation with more than 12 000 members in various enterprises from small to big across South Africa. Sakeliga promotes a favourable business environment in the public interest, by means of its support for a market system and a sound constitutional order. Sakeliga's interest in the Legal Sector Code springs from the code's implication for the functioning of the legal community, given the latter's centrality in the maintenance of a market system and constitutionalism.

www.sakeliga.co.za

Expert submission

Sakeliga has commissioned Martin van Staden, an independent Legal Fellow at Sakeliga and constitutional law expert, to prepare the expert submission found in this document.

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SAKELIGA'S SUBMISSION

Issued by

Piet le Roux

Chief Executive Officer, Sakeliga

Sakeliga's submission on the Legal Sector Code, 2021

Executive summary

- Sakeliga maintains that the Legal Practice Council and such institutions should serve the function of ensuring and overseeing the quality of service and the independence of the legal sector.
- The draft Legal Sector Code detracts from the proper functioning of the legal profession and its institutions because it introduces partisan political considerations (specifically, racial transformation) as matters of law into the industry, when properly understood and legitimately pursued they should be matters of public advocacy and lobbying with and within the industry.
- Sakeliga therefore objects to the draft Legal Sector Code for its deleterious implications on the independence and effective functioning of the legal industry and on the role of this industry in support of the South African constitutional order.

Based on the expert submission commissioned, and in addition to it, I point out the following:

- The Legal Sector Code
    - introduces a sector specific, yet blunt B-BBEE code for the legal industry and brings the legal industry under regulation presided over by the Minister of Trade, Industry and Competition.
    - demands inter alia that "industry stakeholders commit to the implementation of the [code]", and thereby "more effective interventions in certain elements of the [Black Economic Empowerment] scorecard". It further demands that "the entire legal sector (in all its forms) supports the vision of and commitment to a transformed, quality legal profession in compliance with the B-BBEE Act".
    - is inter alia aimed at "facilitating the transformation of the legal services sector so as to ensure that it is representative of the demographics of South Africa" and that there is an "equitable distribution of all areas of legal work [between racial groups]". There must be "demographic representativity in respect of ownership, management, control and employment within legal practices".
    - sets out various formulae for determining BEE scores, according to racial representivity, that applies inter alia to private law firms and advocates, including sole practitioners.
    - forces legal practitioners to provide significant amounts of pro bono work, that is, services without compensation.
- Regardless of the merits of the intentions with the code, the code has a harmful effect on
    - legal practitioners' freedom of trade
    - legal practitioners' ability to operate cost-effectively
    - smaller legal practices to remain profitable
    - legal practitioners' willingness to operate as legal professionals within South Africa and within a recognised regulatory framework
    - clients' ability to be represented by a legal practitioner of their choice
    - client's ability to afford legal practitioners

- the independence of the legal profession (as a pillar of the South African constitutional order) from political interference
- the relationships between legal practitioners and the natural integration of the industry, by subjecting their relationships to political policy given effect in race-proscribing legislation.

Highlights from the expert submission:

- The doctrine of the Rule of Law has always been understood to place a heavy emphasis on the independence of the courts, and by implication, of the judges and legal practitioners who make the courts function as they should. This includes the conduct of judges, legal practitioners, and academics. The Constitution guarantees academic freedom and freedom of association.
- A valid constitutional order requires effective separation of powers, this should include an effective separation of the legal sector and state policy. The legal sector serves a meta-constitutional role in that the sector is necessary for the recognition and vindication of constitutional guarantees. The sector therefore deserves special protection to ensure legal subjects, through the intermediary institution of the legal sector, are protected from a state's abuses.
- The right to freely choose one's legal representation is of crucial importance. Policies that coercively distort this choice should be avoided. The right to choose a legal representative freely is constitutionally guaranteed to arrested, detained, and accused persons. It is submitted that this must apply *mutatis mutandis* to any matter of civil law as well.
- The unlimited freedom of legal subjects to choose their (qualified) legal representatives must be recognised and respected. There is no conceivable way for a limitation on this right to satisfy the standards set by section 36(1) of the Constitution.
- The policy is likely to benefit some practitioners at the cost of clients and will distort the supply of legal services in South Africa. The availability of specialised legal services is already problematic. Measures that worsen supply should be avoided.

Recommendation

Sakeliga's recommendation is that the draft Legal Sector Code should not be adopted. The code introduces partisan political considerations as a matter of law into an industry whose independence should be closely guarded. We recommend that the transformation-related and other aims of the code be made the subject of lobbying with and within the industry, or public advocacy, instead of the subject of law.

EXPERT SUBMISSION

Author(s)

Martin van Staden

Martin van Staden has an LL.B. and LL.M. (*cum laude*) from the University of Pretoria, where he is pursuing an LL.D. in constitutional law. He is a Sakeliga legal fellow, additionally serves on the Rule of Law Board of Advisors of the Free Market Foundation, and serves as the Chief Advisor for Legal Policy on the Board of Advisors of BridgeAfrica. Martin is author of the 2019 book, *The Constitution and the Rule of Law: An Introduction*, and has had his work published *inter alia* in the *Pretoria Student Law Review*, the *African Human Rights Law Journal*, and the *Journal of Contemporary Roman-Dutch Law*.

For more information, visit www.martinvanstaden.com.

1. Introduction

On 11 February 2021, the Legal Practice Council invited comments from interested parties on the Department of Trade, Industry, and Competition's draft Legal Sector Code, 2021. This submission was commissioned by business group Sakeliga.

The desire for a diversity of legal practitioners and their participation in legal intercourse is not objectionable. Achieving this objective, however desirable it might be, must however not come at the expense of other, overridingly important considerations, such as the independence of the legal profession, the integrity of relationship between lawyers and their clients, of the independence of the judiciary, and the supremacy, in substance not merely form, of the Constitution and the Rule of Law.

Economic inclusion benefits the whole society, but only if it is attained in a considered, respectful, prudent, and non-harmful manner. In a constitutional democracy such as South Africa, the ends do not necessarily justify the means.

The draft Legal Sector Code ("the code") is inherently problematic, as it threatens each of these foundational constitutional considerations – the legal community's independence and the supremacy of the Constitution and the Rule of Law. It is therefore recommended that the code be abandoned in its entirety. We elaborate this standpoint under the following headings.

2. Unlike the others: The importance of the legal community

The legal community is composed primarily of the judiciary, the legal profession, and legal scholars. Each of these parts of the legal community are guaranteed independence by the Constitution, both implicitly and explicitly.

Section 1(c) provides that in South Africa, the Constitution and the Rule of Law are supreme. The doctrine of the Rule of Law has always been understood to place a heavy emphasis on the independence of the courts, and by implication, of the judges and legal practitioners who make the courts function as they should.

Section 16(1)(d) guarantees academic freedom *inter alia* for legal scholars.

Section 18 provides that "[e]veryone has the right to freedom of association".

Section 22 guarantees the freedom to choose and practice one's profession freely, subject to reasonable regulation. This applies to all parts of the legal community.

Section 34 provides that "[e]veryone has the right to have any dispute […] decided in a fair public hearing before a court".

Section 35(2)(b) and (3)(f) guarantees the right to choose a legal representative freely to arrested, detained, and accused persons. It is submitted that this must apply *mutatis mutandis* to any matter of civil law as well.

Section 165(2) guarantees the independence of all the courts in South Africa, and subsection (3) provides that no entity, with organs of State explicitly mentioned, "may interfere with the functioning

of the courts". Subsection (4) states "legislative and other measures" must be taken to "assist and protect the courts to ensure independence, impartiality, dignity, accessibility, and effectiveness".

In addition to these various provisions (which must be read together as well as separately), the legal community enjoys a kind of meta-constitutional protection. This is obvious, because in the absence of an independent legal community, all the other guarantees of the Constitution collapse and become empty words on useless paper. The Constitution's justiciability inherently presupposes a strong, functionally independent, and independently minded legal community.

What this *inter alia* means, read in the context of sections 18 and 34 as well, is that an unlimited freedom of legal subjects to choose their (qualified) legal representatives must be recognised and respected. There is no conceivable way for a limitation on this right to satisfy the standards set by section 36(1) of the Constitution. If the State, whether directly or indirectly, directs (or coercively manipulates) subjects as to who they may choose as their legal representatives, all the protections the Constitution grants legal subjects against the State, collapse.

This is not to say the legal profession is necessarily entitled to be entirely deregulated.[1] However, the historical regulation of the legal profession has been exclusively in the interests of ensuring ethical behaviour, avoiding fraud and other criminality, and guaranteeing that all the participants in that profession were appropriately qualified to do so. Safeguards on the integrity of the legal profession are to be appreciated, but such safeguards can arise from careful official rules of conduct as well as from private legal fraternities.

The code represents a break with the previous form of regulation and strives to embed a distinctly ideological character in legal-professional regulation. A character that runs counter to the independence of the judiciary and legal proceedings from ruling party ideology.

The code does not respect the importance of the independence of the legal community, and as such inherently represents a threat to the supremacy of the Constitution and the Rule of Law.

3. Legal Sector Code

3.1 Problematic implications

3.1.1 *Overview*

Section 1 of the Constitution entrenches the values upon which the constitutional order is said to be based. These values are more deeply entrenched than any other provision in the Constitution, as they can only be amended with a 75% majority of the National Assembly, not the usual two-thirds majority.[2] Section 1 is not part of the Bill of Rights and is therefore not subject to limitation in terms of section 36(1) of the Constitution. Section 1(a) lists human dignity and the achievement of equality; section 1(b) guarantees non-racialism and non-sexism; and section 1(c), as previously discussed, guarantees the supremacy of the Constitution and the Rule of Law.

[1] An argument for complete deregulation is plausible and could be sensible. This argument, however, is not pursued in this submission.
[2] Section 74(1) of the Constitution.

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The code problematises the ostensible "lack of sufficient and/or quality legal instructions to black attorneys and advocates". The continued awarding "of major legal commercial and litigation instructions to white-owned firms or foreign-owned and white advocates" is regarded as akin to the "marginalization of black legal firms and advocates". The code further notes that black practitioners function largely in criminal law and personal injury law, which the code, without further ado, regards as "peripheral" areas of law.[3]

The code seeks to introduce "a sector specific code in the legal profession that recognizes the specific unique features and characteristics of the industry". The code demands *inter alia* that "industry stakeholders commit to the implementation of the [code]", and thereby "more effective interventions in certain elements of the [Black Economic Empowerment] scorecard". It further demands that "the entire legal sector (in all its forms) supports the vision of and commitment to a transformed, quality legal profession in compliance with the B-BBEE Act". The "unequal representation of racial sub-groups participating in the industry, based on regional and demographic representations, particularly Africans, Coloureds and Indians" must be addressed, according to the code.[4]

The code is *inter alia* aimed at "facilitating the transformation of the legal services sector so as to ensure that it is representative of the demographics of South Africa" and that there is an "equitable distribution of all areas of legal work [between racial groups]". There must be "demographic representativity in respect of ownership, management, control and employment within legal practices".[5]

The code proceeds to set out various formulae for determining BEE scores, according to racial representivity, that applies *inter alia* to private law firms and advocates, including sole practitioners.

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The code is, above all, a racial code, no different in several of its presumptions from the erstwhile Population Registration Act of 1950. Its racial requirements and provisions deny the human dignity of everyone whose freedom of choice it inhibits, both among the legal community and its clientele. These provisions do not contribute to the achievement of equality as they racially categorise legal practitioners and assign unequal costs and benefits to each such category. This is precisely what legislation from the previous legal era achieved. On its face the code fails the non-racialism test – on this there can be no debate. Finally, the code's provisions, by involving the State in the direction of the legal community – thereby curtailing the community's independence – it severely undermines the supremacy of the Constitution and the Rule of Law.

3.1.2 *Section 1(a): Human dignity, achievement of equality*

Human dignity and the achievement of equality are foundational values of South Africa's constitutional order.

[3] Draft Legal Sector Code 29.
[4] Draft Legal Sector Code 29-30
[5] Draft Legal Sector Code 32.

The superior courts have repeatedly noted the centrality of freedom of choice to human dignity, to the point of regarding these two phenomena as essentially the same thing.[6] The code, primarily but *inter alia*, has a detrimental impact on freedom of choice in two ways. It does not merely limit, but abolishes, the section 18 right to freedom of association within the legal community, and improperly limits the section 22 right to professional freedom.

Freedom of association is formulated without provisos in the Constitution, meaning freedom of association can only be limited in terms of section 36(1). This lack of so-called internal limitations is clear evidence that the Constitution envisages freedom of association to be one of the most protected rights in the Bill of Rights. Such a phenomenon is eminently understandable given South Africa's history of mostly-racialised forced association and disassociation, which the Constitution, and particularly section 18, put a stop to.

Among other things, the code will make it considerably more difficult for legal practitioners to offer affordable rates for their work. Given the restrictive racial and other quotas being imposed on the profession, practitioners will vie only for the most lucrative engagements, and will in general charge clients more, given, for instance, the additional fees they must pay for the administration of the code.[7] The burdensome additional *pro bono* requirements will furthermore drive practitioners to increase their ordinary prices. In other words, not only is the human dignity of practitioners threatened, but also that of ordinary South Africans – the current and potential clients of practitioners. This point is elaborated below.

Whether the code's infringement on section 18 can be justified in terms of section 36(1) is considered below.

Professional freedom is also an important right in the post-Apartheid context. Prior to the introduction of this constitutional guarantee, the government from time to time intensively regulated, often entirely prohibited, people from doing certain work, if they were of a certain skin colour. This not only violated their fundamental human dignity but also contributed to the massive inequality that exists in South Africa today. Professional freedom is, therefore, a key right in the realisation of human dignity and the achievement of equality.

The code severely inhibits professional freedom, as it interferes with legal practitioners' ability to freely set up their billing and human resources arrangements, and, notably, with their briefing of other practitioners. The freedom to choose one's legal advocate is a fundamental aspect of professional freedom within the legal community. It is, in fact, absurd for government to suppose that it may interfere in the determination of who may represent whom in legal intercourse.

Section 22 does allow for regulating the practice of a profession, but this may not be misconstrued as meaning government may regulate improperly, irrationally, or in conflict with other constitutional imperatives. It has already been shown that freedom of association is limited by this regulation. It will be shown that the code's regulation introduces racialism into situations where there ought to be none. It will also be shown that the code's regulation undermines the supremacy of the Constitution and the Rule of Law. Furthermore, it is noteworthy here that the code's regulation does not serve any

[6] https://ruleoflaw.org.za/2021/02/21/finding-constitutional-freedom-of-choice-in-the-right-to-dignity/
[7] One can point for instance to the new Charter Council that must be funded.

legitimate government purpose, as government has no constitutional authority to engage in social engineering. This, too, will be discussed below.

3.1.3 *Section 1(b): Non-racialism*

It is unsurprising that the first provision in the South Africa's post-Apartheid Constitution entrenches the principle of non-racialism. This value, appearing in section 1, must inform and arguably determine, the construction of every other provision that appears in the Constitution. A constitutional provision that does not explicitly refer to race must be construed non-racially, even section 9(2) of the Constitution which is regularly invoked by government to rationalise its unconstitutional racial policies.

Even despite section 1(b), however, non-racialism is a necessary precondition for constitutional government, for a government engaged in racialism is failing to adhere to the primary principle of the Rule of Law that separated pre-modern and modern legal systems: That *all* legal subjects shall be treated equally, and that the *same* law shall be applied equally to both the majority and minority, governor and governed, rich and poor. This is not only a hallmark of the distinctively South African legal order, but of constitutional order generally.

It is clear that the code is a racial code, and as such fails dismally to satisfy the non-racial requirement set by section 1(b).

3.1.4 *Section 1(c): Supremacy of the Constitution and the Rule of Law*

It was mentioned above that ordinary South Africans' human dignity and freedom of choice is also threatened by the introduction of the code. This is intimately related to the threat that the code poses to the supremacy of the Constitution and the Rule of Law, and is the case is obvious for the following reasons.

Legal practitioners are granted an exclusive legislative charter on the provision of legal services in South Africa, and one cannot become a legal practitioner without obtaining a specialised law degree and complying with other statutory requirements.[8] Most ordinary South Africans do not have anywhere near the same level of expertise on legal matters, including their constitutional rights, as practitioners do. Thus, while any person is free to represent themselves in any matter of legal intercourse, including going to court, the reality is that such an enterprise is exceedingly risky and unlikely. Where South Africans are unable to afford legal practitioners, they disengage from the matter entirely (in some instances), and often end up being at the mercy of the State or overworked legal aid professionals.

In other words, ordinary South Africans are almost entirely dependent and reliant upon the services of legal practitioners when it comes to the recognition and vindication of their rights and legal interests. Concerningly, measures that render the sector more encumbered and expensive effectively decreases access to specialised legal services for a great majority of people.

The code introduces blatantly ideological and extra-constitutional considerations into important areas of the functioning of the legal community. Such an approach undermines the role that the legal community in practice must play as impartial mediators, arbitrators, and/or referees between the

[8] Sections 24, 25, and 26 of the Legal Practice Act (28 of 2014).

State and the people of South Africa. The code effectively tries to co-opt legal professionals as agents of the State's ideological agenda.

That the State itself from time to time has an ideological agenda is not being criticised here – it is in the nature of democracy for South Africans to choose representatives with different worldviews and convictions to govern them. However, whoever is in power and whatever their beliefs are, the guarantees and protections offered by the Constitution must always be available to any South African, and if the legal community is dragooned into government's ideological service, these guarantees will be placed on the road to being rendered nugatory.

This, by implication, means ordinary South Africans' ability to have their rights and legal interests properly recognised and/or vindicated is severely undermined. This, in turn, amounts to a grave deprivation of their human dignity. For such recognition and/or vindication to be proper, the legal subject themselves must have an absolutely free choice to choose their qualified legal representative, whatever their skin colour. This is especially important in legal matters that often directly relates to questions of dignity and great consequences to individual integrity.

Another way the code will undermine the human dignity of clients, in particular, is that attorneys, whether black, white, or otherwise, will no longer be on the lookout for the best or most appropriate advocate to serve their needs – bearing in mind the determination of which advocate best serves their and their clients' needs is an entirely subjective valuation. Instead, in many instances, appointments will now predominantly be based on skin colour.

Many advocates will, therefore, without exception, always be over-briefed. As white advocates are essentially deprioritised for legal engagement by means of regulation, mostly sub-par or inexperienced black advocates will be left for the vast majority of attorneys who require someone to brief. *This must not be construed as implying black advocates are sub-par, and thus the point bears repeating: The very best black advocates will be permanently over-briefed, leaving only those black advocates who are not 'the best'.*

Government is thus improperly distorting the supply of legal services, which directly impacts the availability legal services, presently and in future. Instead, government must allow attorneys to brief whoever they subjectively believe will serve their clients' interests best.

3.1.5 Broad-Based Black Economic Empowerment

The constitutional basis of black-economic empowerment is section 217 of the Constitution. This section *inter alia* provides that when organs of State contract for services, they may adopt a policy that provides for the protection or advancement of "persons, or categories of persons, disadvantaged by unfair discrimination". It is trite that this applies exclusively to the State, not to private persons or entities. Section 9(1) of the Broad-Based Black Economic Empowerment Act,[9] therefore, allows the Minister of Trade, Industry, and Competition to issue "codes of good practice on black economic empowerment" such as the present code.

Subsection (1)(b) of the Act provides that the code may include "qualification criteria for preferential purposes for procurement and other economic activities". Section 10, furthermore, provides for the legal status of these codes, and provides that "[e]very organ of state and public entity must take into

[9] Broad-Based Black Economic Empowerment Act (53 of 2003).

account and, as far as is reasonably possible, apply any relevant code of good practice issued in terms of this Act" in various areas of State contracting and State partnerships with the private sector.

It is crucial to note, that in both the Constitution and the Act, the application of codes of this nature is limited to the State and its dealings with private persons or entities. There is no constitutional licence for government to impose codes on persons or entities not engaged with the State, for instance, in a partnership, or tendering for contracts.

Thus, while the Legal Practice Council may be bound by the code, and legal practitioners may be required to be members of the Legal Practice Council, it would be improper and unlawful to impose the code's provisions on members of Council who are not engaged in public procurement or another form of State engagement.

Section 9(2) of the Constitution, which is also often invoked as a rationalisation for government's unlawful racial policy regime, cannot cure this defect. Nothing in section 9(2) can reasonably be construed as allowing government to take complete control of private rights, interests, or affairs, much less the entire legal community in service of a social engineering goal. Indeed, government lacks the constitutional authority to engage in social engineering *per se*.

It is therefore evident that the code's imposition upon attorneys and advocates is *ultra vires* and unlawful under both the Constitution and the Broad-Based Black Economic Empowerment Act.

3.1.6 *Other considerations*

The respected nineteenth-century jurist and economist Frederic Bastiat once wrote:

> "In the economic sphere an act, a habit, an institution, a law produces not only one effect, but a series of effects. Of these effects, the first alone is immediate; it appears simultaneously with its cause; *it is seen.* The other effects emerge only subsequently; *they are not seen;* we are fortunate if we *foresee* them.
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> […]
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> Yet this difference is tremendous; for it almost always happens that when the immediate consequence is favorable, the later consequences are disastrous, and vice versa."[10]

While many of the detrimental effects of the code are not foreseeable, others are very foreseeable.

One such foreseeable consequence is that the code might lead to law firms bringing more advocates in-house, i.e., away from the bar councils and advocates' societies. This could also take the form of attorneys, rather than briefing advocates, appearing in court themselves instead, leading to the creation of a class of litigation attorneys in South Africa. This consequence is not necessarily detrimental to the sector, but would represent an artificial resultant change that was not brought on by normal market forces or social pressure.

[10] https://www.econlib.org/library/Bastiat/basEss.html?chapter_num=4#book-reader

It has already been mentioned that another foreseeable consequence is that the new institutions established by the code, and the compliance burdens imposed by the code, will lead to higher prices for legal services in South Africa. This is simply obvious and not debatable.

Perhaps one of the most dangerous foreseeable consequences is that the code might push both high-quality and low-quality legal practitioners out of the legal profession entirely, and encourage a black market. Among high-quality practitioners a "quasi-legal profession" might be created, where practitioners are no longer registered attorneys or advocates, but "professional advisors" or "legal commentators" who in the course of their business nonetheless provide legal advice and services. Such would be difficult to control without government stepping over a line of regulating privacy and expression, which are rights guaranteed by the Constitution.

Moreover, this quasi-legal profession phenomenon might take a different form, with high-quality legal professionals establishing themselves in foreign jurisdictions and providing legal services to South Africans from there. This, too, might be camouflaged in the garb of alternative terminology.

The ability of South Africa's jurisdiction to regulate this kind of circumvention of established legal-professional regulations is doubtful. Furthermore, it is clear that a more encumbered and costly legal regime would not support goals of improving the access to legal services for most South Africans.

Establishing such a quasi-legal profession is clearly foreseeable given that the code will in all likelihood lower many attorneys' and advocates' profitability. In artificially lowering profitability, fewer professionals may be attracted to the formal industry in the first place. In reducing such incentives, deserving candidates might be attracted to other relatively more profitable professions or services outside of the formal sector.

Facing rising prices, clientele, moreover, would demand cheaper services. One avenue for ensuring cheaper prices is for practitioners to sidestep the onerous provisions of the code and other compliance burdens already existing in the profession.

Principally, the greatest detrimental consequence of the quasi-legal profession phenomenon will not be the conduct of high-quality legal practitioners, but rather those ones who lack integrity and professional ethics.

With the inadvertent incentivisation of a larger market in the 'illegal' provision of legal services, proportionally, many practitioners will no longer subject themselves to the professional regulation or oversight by the Legal Practice Council or the voluntary associations. Due to price distortions, these bad actors may become even more affordable than the practitioners still inside the formal profession, leading to more and more persons making use of such services.

It must be noted, finally, that the code was not accompanied by the requisite socio-economic impact assessment (SEIA). According to the Department of Planning, Monitoring, and Evaluation's 2015 Socio-Economic Impact Assessment System policy, which was adopted in terms of a Cabinet decision, all legislative, regulatory, and policy interventions must be accompanied by a SEIA. This is to ensure all reasonably foreseeable consequences (and benefits) of a given intervention are recorded and being prepared for. In light of the absence of this necessary precondition for introducing a new regulatory or policy measure of this nature, the present process being followed is premature and unlawful, not to mention reckless and irresponsible.

3.2 Section 36(1) analysis

The code, as is evident from the above discussion, limits in some way, shape, or form, at least the rights recognised in sections 10 (dignity), 18 (association), 22 (profession), 34 (access to courts), and 35 (arrested, detailed, and accused persons).

Having established that the code does infringe upon constitutional rights, it is important to measure it against the standards set in section 36(1) of the Constitution, which provides for how a limitation of constitutional rights must be justified. It must, however, be noted, that even if the code passes the section 36(1) test – which it does not – it inherently falls foul of section 1(a), (b) and (c) of the Constitution, which does not appear in the Bill of Rights and is therefore not subject to rights-limitation. It is therefore submitted that by virtue of this reason alone, the code is unconstitutional.

3.2.1 *Law of general application*

The code is neither law nor does it have general application. The code is effectively a regulation – subordinate legislation – and applies exclusively to the legal community. While I submit this disqualifies the code from being a law of general application, it is likely that legal orthodoxy would qualify it as a "law" of "general" application.

3.2.2 *Reasonableness and justifiability*

The factors considered from 3.2.3 onwards below will determine the justifiability of the code. The code's reasonableness, however, is a separate factor to consider.

Reasonableness may be approached in two ways. The first is the reasonable person test: Will a reasonable person of average intelligence and temperament regard the code as justifiable in an open and democratic society based on freedom, human dignity, and equality? We submit that a reasonable person would not, as the code's main characteristic is that it treats persons unequally and subordinates the legal profession to the ideological convictions of the present government.

The second way to approach reasonableness is to ask whether an intervention is rational, proportional, and effective. These factors are dealt with below.

3.2.3 *Open and democratic society*

An open and democratic society necessitates an independent legal community that mediates, arbitrates, adjudicates, and referees between the general public and government. In its absence, the openness and democracy guaranteed by the Constitution is brought into mortal danger. Why this is has been comprehensively discussed above. The code is not compatible with an open and democratic society *per se*.

3.2.4 *Human dignity*

The open and democratic society must however also be based on human dignity. We have discussed at length how the code impairs the human dignity of not only legal practitioners but also of their clientele.

3.2.5 *Equality*

The open and democratic society must also be based on equality. The code's principal characteristic is its unequal treatment of people on grounds of race. Furthermore, the code will likely have a detrimental impact on the poor by leading to higher legal rates and charges.

3.2.6 *Freedom*

The open and democratic society must also be based on freedom. The code *per se* is a negation of freedom by depriving legal practitioners of their ability to determine their own briefing patterns and professional relationships. It also indirectly deprives the general public of their ability to choose their own legal representatives. This has been comprehensively discussed above. In any event, the code is likely to reduce the available choices for legal representation to public's detriment.

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All six of the above factors are determinative of whether something is or is not a justifiable limitation upon a right. The Constitution lists additional relevant factors that may assist in this determination. These are now considered in turn.

3.2.7 *Nature of the right*

The nature of the right of freedom of choice, and access to the courts, in all theirs facets related to the code has been comprehensively discussed above. It bears mentioning again that this right is central to the protection of the supremacy of the Constitution and the Rule of Law itself. If it is allowed to be infringed in the manner contemplated by the code, all other constitutional guarantees collapse.

3.2.8 *Importance of the purpose of the limitation*

The stated purpose of the limitation, an inclusive legal community, is important. It is however not of overriding importance when measured against the rights being impaired. This is particularly pertinent when considering that less restrictive means are available to government.

3.2.9 *Nature and extent of the limitation*

How invasive and how far-reaching is the limitation? The code effectively touches on every important aspect of the legal profession's functioning. Briefing patterns, choice of *pro bono* clientele, professional relationships, etc. It is deeply invasive. It furthermore applies to the whole legal community – directly to legal practitioners, and indirectly to judicial officers and scholars.

3.2.10 *Rationality of the limitation*

Rationality analysis asks whether there is a relationship between the limitation and its purpose. If the purpose is simply for black advocates to be briefed at a higher rate and more black attorneys to be appointed, there is such a relationship. It is however again worth mentioning that neither of these purposes are legitimate government purposes. Social engineering is not a power granted to government by the Constitution, and section 9(2) may not be construed as allowing racial social engineering given the prohibition on racialism in section 1(b).

3.2.11 *Proportionality of the limitation*

Proportionality analysis asks whether the limitation is proportionate to the purpose it seeks to serve. In other words, whether it can achieve the same purpose by less restrictive means. The code is draconian, and represents perhaps the worst thing government can do in restricting the rights of legal practitioners and their clients short of nationalisation of the entire sector. Government, instead, could provide incentives for briefing black advocates and hiring black attorneys – tax reductions or exemptions, subsidies, additional State work with surcharged rates when black practitioners are used, etc. Indeed, many such less restrictive means are available to government to achieve its purpose.

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It is clear, therefore, that in addition to the code's unconstitutionality in terms of sections 1(a), (b) and (c) of the Constitution, it also fails the test of justifiability in terms of section 36(1), and is for that reason, too, unconstitutional.

4. Conclusion

The comments in this submission ought not be construed as being opposed to economic inclusion and development. Economic inclusion and growth that benefits the most vulnerable in society are worthy goals. However, the only sustainable and justifiable way to achieve these ends (bearing in mind that even these ends do not justify any and all means) is through a constitutional order that is based, in large part, on freedom of choice and an independent legal community. We cannot sacrifice the very supremacy of the Constitution and the Rule of Law to attain inclusion and growth – we must ensure we strengthen the former while attaining the latter instead.

ADDENDA

Addendum 1: Common law constitutionalism[11]

Introduction

Constitutionalism refers not only to the written Constitution, but to the constitutional order in which the Constitution finds itself. The constitutional order includes various principles and customs that the Constitution itself does not explicitly express.

One may consider, for example, the principle that the legal rules expressed in legislation must be clear and unambiguous. The Constitution itself contains no such requirement, but it is commonly recognised that no unclear legal rule may be enforced upon legal subjects and that such a rule is *ab initio* void for vagueness. This rule is absolute and supreme, as no proper court of law will enforce that which either the court itself or the legal subject concerned cannot understand.

These rules and principles are usually borne out of a society's *jus commune* -- its common law. In South Africa, therefore, English and Roman-Dutch constitutional principles, and perhaps in the future some principles of African customary law, make up the constitutional order, alongside the written Constitution.

This addendum considers some of these important principles of the constitutional order that do not necessarily find explicit recognition in the Constitution.

Constitutionalism

Written constitutionalism

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

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

[11] This addendum has been adapted, albeit not exclusively, in large part from Sakeliga's submission on the policy of expropriation without compensation, prepared by Prof Koos Malan.

But if the Constitution is to be amended, the process must not simply amount to Parliament going through the constitutional procedure and adopting the amendment. There must be a drawn-out, years-long public consultation process to determine whether a national consensus exists. The Constitution sets out how an amendment must be processed, but a government cannot act without a mandate.

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

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

Enshrining something, in the constitutional sense, means to place that thing somewhere where it is protected, in this case, in a constitution.[12] But legislation cannot change reality, in this case being the reality of rights: South Africans have rights outside of the Constitution, and if a provision in the Bill of Rights is repealed, that does not mean South Africans 'lose' that right. If this were the case, there would be little use in referring to rights as 'human' rights, as section 1 and the Preamble of the Constitution do. We are rights-bearing entities because we are humans with dignity and individuality, not because government has 'given' us those rights.

If the Bill of Rights is thus amended, the basic essence of the right in question must remain. If protection for human rights is removed from the Constitution, South Africa's constitutional project will be severely undermined in that the highest law will continue to recognise the rights in question, but will not protect them. This is not a situation South Africans would want to find themselves in. By implying that government can 'extinguish' a right by simply removing it from the Constitution, the impression is created that rights are an idea owned by the State, and not the people. This would be faulty both according to human rights theory, but also according to the logic of the Constitution itself.

Any constitution is meant for the ages. As respected constitutional scholars Herman Schwartz and Richard A Epstein have noted, "Constitutions are written to supply a long term institutional framework, which by design imposes some limitations on the power of any given [parliamentary] majority to implement its will".[13] The Constitution of the United States — a standard-setter for constitutionalism — has endured for 230 years and been amended only 27 times. South Africa's Constitution has been amended 17 times in 23 years, with most amendments being technical or procedural.

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

[13] Epstein RA. "Drafting a constitution: A friendly warning to South Africa". (1993). 8 *American University Journal of International Law and Policy*. 567.

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

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

Unwritten constitutionalism

Constitutionalism presupposes the pursuit of justice on a grand scale, that is, for the whole of the polity, and more specifically for all individuals and communities within the polity. In this way, constitutionalism is inextricably associated with the pursuit of justice, but this normative commitment – the commitment to justice – is only one side of the constitutional idea. The second element of constitutionalism relates to power: power that has to serve as a rampart that supports the normative – the justice element. Hence the normative element has to be complemented by a real element, which consists in the structures for the suitable allocation and checks on political power, thus to ensure that power is not abused; to ensure that it is exercised for the benefit of the whole instead of degenerating into privateering for the sake of only a segment – either a minority or a majority. The structural element is essential to constitutionalism. Precisely for that reason questions around governmental power – its allocation, exercise, limitation and control – are and have always been essential for constitutionalism.

In the present context the following two prerequisites, both relating to the real element of constitutionalism, are crucial. The first is citizenship and the second is the notion of the dispersal of power and (mutual) checks and balances.

- Citizenship in the real sense of the word is not viable without the protection of personal property rights, that is, the property rights of individuals and juristic persons; and
- Constitutionalism is founded on the basis of the dispersal of power among the largest possible number of centres of power, more specifically not only the three centres of state power, but the widest range of loci of private, civil and economic power (here in after referred to as institutions of civil society). These loci of power must be strong enough to counterbalance governmental power and strong enough to counterbalance each other, thus to ensure that no locus of power grows so strong that it gains absolute power that would allow it to abuse its power to the detriment of any segment of the populace. Once any locus of power, and specifically the state, is so strong that it can act in an unconstrained fashion, it becomes absolutist. That rings the death knell of constitutionalism. Institutions of civil society constitute loci of power capable of discharging their check and balance function only when they have their own property, which allows to them act autonomously.

Citizenship

It is important to clarify the meaning of citizenship. That requires, amongst other things, that citizenship be distinguished from the concepts of subject and consumer. The latter two should not be confused with that of citizenship; in reality they stand in opposition to the idea of citizenship.

From the point of view of constitutionalism, it would be most inappropriate to view the populace – also the South African populace – as a collection of subjects. Subjects denote a relationship of subordination, inequality and dependence of the populace vis-à-vis government. It is an inappropriate, essentially monarchical concept, which is incompatible with the very notion of republicanism which is the idea on which the South African constitution claims to be premised.

Viewed through the prism of constitutionalism it would be equally inapt to conceive of the South African populace as collection of consumers. A consumer is by definition in a commercial relationship in which the identity of buyer, tenant, borrower, or whatever other commercial identity stands at the centre.

In contrast to the above, in pursuance of the very notion of constitutionalism, the appropriate public identity of members of the populace should be that of citizens.

Citizenship, unlike the identities of consumer and subject, primarily denotes the ability to participate independently and on an equal footing with all other citizens in the joint endeavour to govern the polity in the public good and to the benefit of the citizenship body as a whole, through a process of even-handed rational public discourse and compromising decision-making.

Independent participation of all citizens in the continuous enterprise of government for the public good, is impossible, however, if the people are economically reliant, especially solely reliant on another person or entity, more specifically if people are reliant on the state. When the populace is dependent on the state for their livelihood, they are not citizens anymore. Then they are but subordinate subjects and state-dependent consumers.

Dispersal of power and civil society

The notion of the dispersal of power and attendant checks and balances lies at the very core of the constitutional idea. This is particularly also true for South Africa priding itself of a constitutional dispensation that purports to subscribe to the idea of constitutionalism. It is important to emphasise that the dispersal of power is not limited to the traditional idea of the trias politica – the threefold separation of power between the legislature, executive and the judiciary. Trias politica, though important, provide but the basic rudiments for a full-fledged system of power dispersal. Dispersal of power goes much broader than trias politica. It includes a rich plethora of power centres of civil society, commercial enterprises and other economic endeavours, cultural and religious endeavours, educational institutions, religious institutions, charity organisations and many more non-governmental

organisations and many more institutions of civil society. The need for the dispersal of power among all these centres is a generally accepted prerequisite of sound modern-day constitutional law. In their absence the spectre of absolutism, more specifically of unrestrained governmental power which is by definition an outrage against the very foundation of constitutionalism, looms dangerously large.

The mentioned plethora of institutions of civil society fulfils two important roles.

In the first place they provide the best rampart against absolutism. They act as a counterbalance against absolutism of an excessively powerful, centralised government. Bills of Rights, that seek to protect the rights of individuals against actual and threatened governmental violations of rights, is more often than not of no practical value. Individuals lack the required muscle to take on a powerful rights-infringing government. Moreover, even if an individual does have the power to sue for the remedying of rights, the courts may rule in favour of government because they share the same ideological convictions. Even if a court does rule in favour of (an) individual/s, orders are not complied with and turn out to be judicial wishes rather than true binding orders. The South African experience of the past decades are swamped of such cases, where the executive and the state administration have proven to be unwilling and / or able to heed to words of the judiciary. Institutions of civil society are the only instruments with sufficient muscle to provide the required check on an infringing state and that can, at the same time, enlist the resources to fill the void left by a faltering state. Institutions of civil society in this way is the only genuine guarantee for the rights and interests of people and for sustaining constitutionalism.

Secondly, institutions of civil society also act as a mutual power balance and check on each other, thus avoiding and / or countering the abuses accompanied by economic monopoly practices in a way similar to how they keep a rights-infringing centralised government in check and/ or fill the gap left by a faltering state.

Conclusion

Citizenship and autonomous institutions of civil society also mutually imply one another:

- Citizenship – the capacity to participate in the governance of the polity – is reinforced and strengthened when people assemble and act through institutions of civil society, instead of acting individually on their own with much greater difficulty; and

- Institutions of civil society on the other hand cannot be viable without citizens joining these institutions and without them materially contributing towards such institutions, thus enabling these institutions to discharge their check and balance function.

Conduct by government, whether executive, legislative, or judicial, must respect and promote citizenship and civil society, not undermine or attack them.

Addendum 2: Section 1 of the Constitution[14]

Introduction

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

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

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

Section 1(a): Human rights and freedoms

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

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

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

Finally, it is worth noting that had this provision been given the due respect and recognition it demands, South Africa's unemployment rate would not be nearly as high as it is today. The Bill of Rights, particularly sections 9 and 23, have been interpreted in such a way that government has been

[14] This addendum was adapted in large part, albeit not exclusively, from the submission of the Free Market Foundation on the 2020 annual review of the Constitution. The sole author of that submission is one of the co-authors of this submission.

empowered to disregard the human rights and freedoms of the jobless in favour of those with trade union membership. Section 1(a) read with section 22 of the Constitution as a matter of course must have the consequence that jobseekers are not disallowed from seeking employment on such terms that they deem beneficial to themselves.

But legislation such as the National Minimum Wage Act[15] stands in evident conflict with these provisions, by regimenting labour relations in accordance with academic and politically convenient narratives rather than the best interests of the poorest among us. We submit that section 1(a), and also section 1(c) discussed below, must permeate any legislation and regulations promulgated by government, and in this respect, it is evident that this has not happened. Had if happened, legislation like the National Minimum Wage Act would never have been enacted.

Section 1(b): Non-racialism

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

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

Section 1(c): The Rule of Law

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

Section 1(c) of the Constitution provides that South Africa is founded upon the supremacy of the Constitution and the Rule of Law. Section 2 provides that any law or conduct that does not accord with this reality is invalid. This co-equal supremacy between the text of the Constitution and the doctrine of the Rule of Law remains underemphasised in South African jurisprudence, but it is important to note.

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

One of the Constitutional Court's most comprehensive descriptions of what the Rule of Law means was in the case of *Van der Walt v Metcash Trading Ltd*. In that case, Madala J said the following:

> "[65] The doctrine of the rule of law is a fundamental postulate of our constitutional structure. This is not only explicitly stated in section 1 of the Constitution but it permeates the entire Constitution. The rule of law has as some of its basic tenets:
>
> > 1. the absence of arbitrary power – which encompasses the view that no person in authority enjoys wide unlimited discretionary or arbitrary powers;
> >
> > 2. equality before the law – which means that every person, whatever his/her station in life is subject to the ordinary law and jurisdiction of the ordinary courts.
> >
> > 3. the legal protection of certain basic human rights.
>
> [66] The concept of the rule of law has no fixed connotation but its broad sweep and emphasis is on the absence of arbitrary power. In the Indian context Justice Bhagwati stated that:
>
> > 'the rule of law excludes arbitrariness and unreasonableness.'
>
> I would also add that it excludes unpredictability. In the present case that unpredictability shows clearly in the fact that different outcomes resulted from an equal application of the law".[16]

The Rule of Law thus:

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

The Good Law Project's Principles of Good Law report largely echoed this, saying:

> "The rule of law requires that laws should be certain, ascertainable in advance, predictable, unambiguous, not retrospective, not subject to constant change, and applied equally without unjustified differentiation".[17]

[16] *Van der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC) at paras 65-66. Citations omitted.
[17] Good Law Project. *Principles of Good Law*. (2015). Johannesburg: Law Review Project. 14.

The report also identifies four threats to the Rule of Law,[18] the most relevant of which, for purposes of this submission, is the following:

> "[The Rule of Law is threatened] when laws are such that it is impossible to comply with them, and so are applied by **arbitrary discretion** […]"

Friedrich August von Hayek wrote:

> "The ultimate legislator can never limit his own powers by law, because he can always abrogate any law he has made. The rule of law is therefore not a rule of the law, but a rule concerning what the law ought to be, a meta-legal doctrine or a political ideal".[19]

What is profound in Von Hayek's quote is that he points out that the Rule of Law is not the same as a rule of the law. Indeed, any new Act of Parliament or municipal by-law creates and repeals multiple 'rules of law' on a regular basis – expropriation without compensation would be an example of 'a' rule of 'the' law. The Rule of Law is a doctrine, which, as the Constitutional Court implied in Van der Walt, permeates all law, including the Constitution itself.

Albert Venn Dicey, known for his *Introduction to the Study of the Law of the Constitution*, and considered an intellectual pioneer of the concept of the Rule of Law, wrote that the Rule of Law is "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even wide discretionary authority on the part of the government".[20]

Dicey writes "the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint".[21] He continues, saying the Rule of Law means "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government".[22]

The opposition to arbitrary power should not be construed as opposition to discretion in and of itself. Officials use discretion to determine which rules to apply to which situation, and thus some discretionary power is a natural consequence of any system of legal rules. However, the discretion must be exercised per criteria which accord with the principles of the Rule of Law, and the decision itself must also accord with those principles.

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[18] Good Law Project 29.
[19] Von Hayek FA. *The Constitution of Liberty*. (1960). Chicago: University of Chicago Press. 206. Our emphasis.
[20] Dicey AV. *Introduction to the Study of the Law of the Constitution*. (1959, 10th edition). London: Macmillan. 202-203.
[21] Dicey 184.
[22] Dicey 198.

A common example of arbitrary discretion is when a statute or regulation empowers an official to decide “in the public interest”. What is and what is not “in the public interest” is a topic of much debate, and empowering officials to apply the force of law in such a manner bestows upon them near-absolute room for arbitrariness. The “public interest”, however, can be one criterion among other, more specific and unambiguous criteria.

The fact that some discretion should be allowed is a truism; however, the principle that officials may not make decisions of a substantive nature still applies. Any decision by an official must be of an enforcement nature, i.e., they must do what the legislation substantively requires. For instance, an official cannot impose a sectoral minimum wage. The determination of a minimum wage is properly a legislative responsibility because it is of a substantive nature rather than mere enforcement.