SAKELIGA

SELFSTANDIGE SAKEGEMEENSKAP

21 September 2022

TO:	B-BBEE Unit, Department of Trade, Industry, and Competition
ATTENTION:	Ms Lindiwe Mavundla / Ms Kumbe Mhlongo
DELIVERED:	By email: legal@dtic.gov.za

To whom it may concern,

SUBMISSIONS: LEGAL SECTOR CODE, 2022

The draft Legal Sector Code detracts from the proper functioning of the legal profession and its institutions and contains various elements that would be impossible to comply with. Sakeliga 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.

About Sakeliga

Sakeliga is a not-for-profit business group and public benefit organisation with more than 11,000 members in various enterprises 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.

www.sakeliga.co.za

Contributors

Piet le Roux	Martin van Staden
Chief Executive Officer	Legal Fellow

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SAKELIGA'S SUBMISSION

Issued by

Piet le Roux

Chief Executive Officer, Sakeliga

Sakeliga's submission on the Legal Sector Code, 2022

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 22 July 2022, the Department of Trade, Industry, and Competition invited comments from interested parties on its draft Legal Sector Code, 2022. 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.

Additionally, it is absurd that the Department of Trade, Industry, and Competition, through the code, is to gain any kind of oversight or controlling authority over the legal profession. Until recently, the advocates' profession (in particular) was entirely independent of State control, subject only to self-regulation and judicial oversight. This independence was then replaced with the Legal Practice Council under the Department of Justice, in terms of the Legal Practice Act, and now the Department of Trade, Industry, and Competition, in short succession. The legal profession is in grave danger of being co-opted entirely.

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.

[1] An argument for complete deregulation is plausible and could be sensible. This argument, however, is not pursued in this submission.

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.

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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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[2] Section 74(1) of the Constitution.
[3] Draft Legal Sector Code 29.
[4] Draft Legal Sector Code 29-30
[5] Draft Legal Sector Code 32.

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.

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We borrow liberally from Adam Pike's submission of 9 September 2022, where Pike made the following observations that must be endorsed and emphasised:

The code is entirely inappropriate when it is applied to sole legal practitioners. A sole practitioner cannot meet BEE requirements. A law firm with a board of directors can make provision for BEE elements and ensure a racially diverse shareholding, but this is impossible for sole practitioners. This is even more problematic when one factors into account that most legal practitioners in South Africa are sole practitioners. Pike additionally notes:

> "It's impossible for a Qualifying Small Entity generating over R3 million but not more than R15 million owned by a "white" male to comply with the ownership or management score card.
>
> 'White' attorneys in non-litigious practice will be unable to score Compliance Target Points for procurement of legal services from 'black' advocates, for the obvious reason that they have no use for advocates, regardless of their race."

The code, furthermore, disregards the consensual and fiduciary nature of the relationship between practitioners and their clients. Interfering in this relationship is a serious breach of an important tradition.

The Broad-Based Black Economic Empowerment Act does not enable the Department of Trade, Industry, and Competition, or the Legal Practice Council, to expropriate the trading stock (time) of practitioners, nor to force practitioners to donate that stock, in the form of *pro bono* services. In other words, this aspect of the code is *ultra vires* its enabling Act. Additionally, this burden, as it is primarily aimed at so-called "white" practitioners, necessarily contravenes the prohibition against unfair discrimination found in section 9 of the Constitution.

Pike notes that compulsory white *pro bono* services, does not transform the legal sector, which is what a BEE code like the code must be aimed at doing. The purpose of the BEE Act is to transform economic sectors, not to provide for free goods and services to the sectors clients and customers," writes Pike. The mere fact that white practitioners must provide these services pro bono, but other practitioners need not, in addition to amount to brazen unfair discrimination, also amounts to a race-based (excise) tax.

We, furthermore, agree with Pike that compulsory *pro bono* services amounts to conscription, which is prohibited by the section 13 constitutional right against slavery and forced servitude. While section 22 of the Constitution allows regulation of the practice of a profession, forcing a professional to work gratis – especially when they are not in any kind of probationary period of service, such as pupillage or being an article clerk – is necessarily slave labour. Pike writes:

> "In *Affordable Medicines Trust v Minister of Health of the RSA* the Constitutional Court stated that the capacity of individuals to exercise right to freedom of trade, occupation and profession is limited by economic necessity or cultural barriers, but legal impediments are not to be countenanced unless clearly justified in terms of the broad public interest.
>
> The draft Code imposes a regulation on the professional practice of law in a number of ways that have a disproportionately adverse effect on 'white' people set out above. Moreover, the regulation is not directed to the practice of law per se. It imposes conditions on the practice of law by 'white' people, unrelated to the substantive practice of the profession itself.
>
> None of the adverse effects meet the limitation test under section 36(1). The burden placed upon on 'white' lawyers by the draft Code constitutes a limitation of a guaranteed right, namely the right to equality, that cannot be justified under section 36(1) of the Constitution."

At the end of the day, practitioners' clients will suffer as the former attempts to compensate for these additional and unavoidable costs. The code, then, stands to make legal services more expensive across the board.

Pike points to the moral hazard that is created under the code. The *pro bono* requirement might well incentivise white practitioners to exaggerate the amount of time they have spent on the *pro bono* cases they have been forced to take, and at the same time provide the bare minimum quality of service. As Pike reasons, "public service should be completely voluntary on the part of individuals who wish to donate their services. Put differently, it is unseemly to enforce charity."

The establishment of the Legal Sector Transformation Fund is itself also problematic, as it provides an avenue for white practitioners to opt-out of providing *pro bono* services by paying into the fund. According to Pike, this will channel funds to black practitioners (who have necessarily graduated and are working in an elite profession) rather than to the would-be, poor beneficiaries of *pro bono* services. Both proposals – conscription into *pro bono* service and the Legal Sector Transformation Fund – create perverse incentives and situations, and ought to be avoided.

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.

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

[6] https://ruleoflaw.org.za/2021/02/21/finding-constitutional-freedom-of-choice-in-the-right-to-dignity/

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

[7] One can point for instance to the new Charter Council that must be funded.

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

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

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 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.

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

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.
>
> […]
>
> 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.

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.

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

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.