SAKELIGA

SELFSTANDIGE SAKEGEMEENSKAP

11 May 2021

TO:	Department of Justice and Constitutional Development
ATTENTION:	Department of Justice and Constitutional Development
DELIVERED:	By email: fbhayat@justice.gov.za

To whom it may concern,

SUBMISSIONS: PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION AMENDMENT BILL, 2021

Overview

Sakeliga NPC takes this opportunity to comment on the Promotion of Equality and Prevention of Unfair Discrimination Amendment Bill, 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.

Sakeliga seeks to offer oral commentary on this 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 Promotion of Equality and Prevention of Unfair Discrimination Amendment Bill ("PEPUDA Amendment Bill") springs from the bill's implication for most everyday, including commercial, interactions and intercourse. This has significant implications for the 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 PEPUDA Amendment Bill, 2021

Executive summary

As a business group, Sakeliga focuses its comment on the PEPUDA Amendment Bill mostly on the bill's likely impact on social interactions and commercial relations. From our perspective, the bill, should it become law, will place all persons and businesses in South Africa in an impossible double bind. All will be subjected to a law that is at best unreasonable and – at worst – impossible to adhere to.

Nevertheless, it empowers state agents, usually in the form of the Human Rights Commission, to engage in legal action against individuals, for wrongdoings which is legally unclear and arbitrary. It also allows malicious private persons to litigate against their fellows, with state condonation, encouragement, and potentially even, state resources, based on less rigorous burden of proof for harms.

We consider the bill as unworkable and its redefinitions of discrimination, prejudice, and equality as deeply problematic and out-of-bounds of the constitutional order.

Effectively, the bill empowers intrusion into the domain of private and ordinary social choice and preference. And potentially sets up government to be a force of intrusion into these realms, outside of the normal and healthy constitutional (and moral) limits.

These are our concerns:

- The bill effectively empowers state agents and malicious private persons to undertake nearly full-blown arbitrary legal proceedings and investigations against individuals, because the bill, its definitions, and implications are so legally arbitrary and open to discretionary state action.
- The bill effectively mandates all persons, in society, including non-governmental organisations and enterprises, to support an ideological and political redefinition of equality, discrimination, and prejudice, which breaks with a sound constitutional order.
- To Sakeliga, the constitutional definition of "equality" is clear. According to the Constitution, equality means the law treats legal subjects equally and affords them equal protection and benefit, including full and equal enjoyment of constitutional rights and civil liberties.
- The bill, however, already based on the existing Equality Act's dubious conceptualisation of equality, establishes "substantive equality" as a dangerous further mechanism that allows virtually unlimited, unending, and perpetual state intrusion into the private lives, choice, and preferences of citizens and businesses at the expense of the equal constitutional value of freedom.

- Litigants, backed by government force, emboldened with this redefined law will have vastly expanded means at disposal to take legal steps and institute costly investigations against individuals, businesses, and communities, in courts where the burden of proof for proving actual harm is much less rigorous or ignored.
- State agents, malicious private persons and organisations will effectively be granted a wide-ranging discretion that allows them many potential targets for accusation, investigation, and proceedings, on the grounds of discrimination; but such targets would have little clear standard, guidance, or defence, on ways not to transgress under this bill if it becomes law.
- We find little to suggest that government agents, or malicious private persons, will not be able to litigate against nearly all forms of social choice, expression of taste or preference, or social discernment. How is this law to be limited to secure equally valid constitutional rights, such as freedom of association, expressions, and belief?
- The Constitution makes a distinction between fair and unfair discrimination, and the meaning of these phenomena within the constitutional logic are fairly easily determinable. Government, with the Amendment Bill, is instead trying to arbitrarily define these terms and progressively enlarge the scope of unfair discrimination out of constitutional bounds.
- The bill's provision that an employer will be jointly and severally liable for the discriminatory conduct of their employees or agents raises several concerns. Importantly, it denies the agency, and therefore human dignity, of employees. Employers will have to keep employees under constant supervision and develop policies, processes, and methods to police employee behaviour, for missteps which are legally dubious, arbitrary, and legally unclear.
- Vicarious liability already exists for employee conduct in the law of delicts and other objective harms; however, the bill will expand this concept out of constitutional bounds for harms real or imagined. The dignity of the target of these malicious prosecutions will also be affected by a law which in effect allows for arbitrary, uncritical, malicious, and discretionary legal proceedings.
- The costs of labour hours, expert guidance, and other compliance burdens will weigh into costs for business to avoid transgressing against this arbitrary edict, which will result in higher costs to consumers, with a disproportionately negative impact on poorer people's purchasing power.

Recommendation

Sakeliga regards the bill as inherently and deeply problematic. The best course of action is to abandon it entirely. However, should it not be abandoned, we refer to the expert submission below for several specific criticisms and clause-by-clause recommendations that might alleviate some concerns with some of the bill's objectionable elements, even if insufficiently so.

EXPERT SUBMISSION

Author

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 12 May 2021, the Department of Justice and Constitutional Development published the Promotion of Equality and the Prevention of Unfair Discrimination Amendment Bill ("Amendment Bill") for public comment. This submission was commissioned by business group Sakeliga.

Sections 9 and 10 of the Constitution entrench the constitutional rights to equality (and against unfair discrimination) and human dignity. These are, in turn, based on the constitutional values bearing the same name found in sections 1(a) and 36(1) of the Constitution. The Promotion of Equality and the Prevention of Unfair Discrimination Act ("principal Act") was enacted *inter alia* to give effect to these rights.

It cannot be denied that government has an obligation in terms of the Constitution to advance human dignity and equality. There are, however, better and worse ways to do this. It would be incorrect to argue that whatever means the government, in the moment, decides to adopt to advance these rights and values, is *ipso facto* legitimate simply because the goals are legitimate. The means must themselves be compatible with the ends. In other words, if the means to achieve human dignity and equality themselves undermine dignity and equality or any other constitutional rights or values, those means are ill-considered and unviable.

It is submitted that the Amendment Bill, regrettably, falls short of important social and constitutional realities and imperatives, in a significant way. The Amendment Bill, in fact, represents an existential threat to the open and democratic society that South Africa is constitutionally required to be. If adopted, this legislation could see ordinary, everyday social interaction prohibited because that interaction satisfies the requirements of the new, nonsensical, definition of unfair discrimination. In this way the proposed legislation threatens the open society. Furthermore, the legislation undermines democracy by elevating the government's present ideological conceptualisation of equality to the status of law, effectively disallowing civil society from dissenting from this particular conviction.

Various constitutional rights and values are therefore at risk of being infringed should the Amendment Bill be adopted. This argument is developed under the following headings.

2. So-called "unfair discrimination"

Discrimination is an inherent part of human reality. Everything we do as social beings involves discrimination: Discrimination between things to do, see, consume, say, think. But we also discriminate against other people: Discrimination between those to marry, debate, become friends with, trust, employ, regard in a good light, love. There is nothing a person can do that does not necessitate discrimination of a sort.

The very word "discrimination" has its roots in the Latin *discriminare*, a verb meaning "to distinguish between". It must be emphasised that this word is a verb, but also a verb that connotes a conscious

choice. Discrimination, in other words, is not simply an abstract state of affairs – it is something that is *done*. Furthermore, it is not something that can simply happen – it must be *intentional*.

The social understanding of discrimination has since then become associated with prejudicial treatment – which is simply another thing humans as social beings do: We pre-judge things and people almost always, in some way.

But the negative connotation associated with discrimination has a solid foundation in the idea that certain kinds of discrimination are, indeed, problematic. Certain kinds of State discrimination, for instance, are impermissible. Indeed, it has long been accepted as an imperative of the Rule of Law that people must be treated equally at law by the State.

This makes intuitive sense. The State, theoretically, owes its legitimacy to a social contract between the whole of society and itself. If some people are excluded from the social contract, then as a matter of course they need not abide by the State's edicts. Similarly, everyone present within a government's jurisdiction, at least today, pays for the upkeep of that government in some way, whether through taxes or even import dues. The modern State is constituted in such a way that it discriminating against people will almost always give rise to serious concerns about justice, fairness, and legitimacy, in ways that private discrimination – even by the largest company – never will nor ought.

It is thus that historical discrimination in the form of slavery, segregation, women's disenfranchisement, and apartheid – all primarily forms of State discrimination – was on its face unjust. Some proponents of these systems of discrimination even conceded that they were far from ideal and raised important moral concerns, but nonetheless persisted for what they regarded as pragmatic reasons.

Given South Africa's history of apartheid the Constitution was adopted with a strong anti-discrimination provision. Sections 9(3)-(5) of the Constitution thus provide as follows:

> "(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

The legislation referred to in subsection (4), the principal Act, was enacted in 2000. Section 1 of the principal Act defines "discrimination" as "any act or omission, including a policy, law, rule, practice, condition, or situation which directly or indirectly imposes burdens, obligations or disadvantage on;

or withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds." The section further defines "prohibited grounds" as including all 15 grounds mentioned in section 9(3) of the Constitution, but also including "any other ground where discrimination based on that other ground causes or perpetuates systemic disadvantage; undermines human dignity; or adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on" one of the 15 explicit grounds.

Section 14 of the principal Act sets out how "fair" and "unfair" discrimination is determined. It provides that "measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons" does not qualify as unfair discrimination. Discrimination is otherwise fair taking into consideration *inter alia* the context, whether the activity concerned intrinsically allows or requires discrimination, and whether the discrimination impairs or is likely to impair human dignity.

Both the principal Act's definition of discrimination (with particular reference to how the prohibited grounds are conceived) and its definition of fair and unfair discrimination are extra-constitutional. In other words, they cannot be traced back to any constitutional provision that attempts to guide what these important notions, no less constitutional notions, mean in practice.

That the Constitution distinguishes between fair and unfair discrimination means that these two phenomena have a knowable content that does not depend on the principal Act. The Constitution, in other words, does not allow ordinary legislation to define what constitutional provisions mean. This is obvious, as to believe otherwise would be to reject the idea of a supreme constitution. If constitutional words can simply be defined any which way the legislature pleases, those words lose their character as supreme (i.e., above the legislature and other branches of government).

The principal Act's approach to discrimination is therefore highly doubtable as far as constitutional congruence relates. A better approach is to determine what discrimination, and particularly unfair discrimination, means in the Constitution itself.

Section 36(1) of the Constitution might provide some guidance in determining what might be meant by discrimination. It is important to remember at this juncture that South Africans have a right to equality, but such a right may be limited, and such a limitation might take the form of discrimination. Those discriminations that meet the section 36(1) test might be regarded as fair discriminations, and those that do not, are established to be unfair discriminations. There is no provision in the Constitution that provides that this is how fair or unfair discrimination is determined, but it is submitted that using an existing constitutional mechanism to determine the appropriate constitution meaning of a provision of the Constitution is more appropriate than to leave it entirely in the hands of Parliament to define, as it has tried to do originally in the principal Act and now again in the Amendment Bill. Section 9(5) cannot possibly be taken to mean Parliament can whimsically redefine and reconceptualise what fair and unfair discrimination entails, as the distinction between these two forms of discrimination will then become redundant and useless.

More than that, section 9 itself must prove central to determining the meaning of discrimination. Sections 9(1)-(2) provide:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."

Unfair discrimination, in other words, is linked to the constitutional definition of equality, *viz*., the law treats legal subjects equally and affords them equal protection and benefit, including full and equal enjoyment of constitutional rights and civil liberties. It can be argued with authority, therefore, that only those matters that detract from the constitutional conceptualisation of equality might qualify as unfair discrimination, if it is not justifiable by the section 36(1) inquiry. Other forms of discrimination, which do not affect constitutional equality, are ordinary, allowable, discriminations, and if discrimination that does affect that equality is justifiable by section 36(1), it remains fair.

3. So-called "substantive equality"

Other than its focus on discrimination, the principal Act also concerns itself with the promotion of equality. This is also the other side of section 9, being subsections (1)-(2) as quoted above.

The Constitution is a legal instrument. Any undefined reference to "equality" must therefore be construed as a reference to *legal equality*. The Constitution does, however, provide a definition of equality, and this definition is closer to legal equality than what is nowadays (and in the Amendment Bill) referred to as "substantive equality", which effectively means equality of outcome and equality of resources.

Substantive equality is said to mean government must in practice venture to make people more equal in terms of material wealth. This has manifested in the form of employment equity, quotas, and general racial-preferencing. There is a lot of debate about whether this is desirable or even possible.

It is important to ask whether South Africans should aspire to sameness, or whether they should be free to make their own choices and rather aim as high as they possibly can? In other words, is material equality – often meaning equality of poverty – sufficient for a free and prosperous society? Human nature and the laws of economics have shown repeatedly that with the divergences of culture, individual interests, capabilities, etc., complete equality is impossible. The only type of plausibly achievable equality is equal protection of the law, *viz*. legal equality.

Outside of legal equality, any other conceptualisation of equality, which might have merits, is an ideological conceptualisation. The Constitution does not impose ideological beliefs on South Africa,

but instead creates the environment – *inter alia*, through legal equality – for legal subjects to come to their own ideological conclusions. The Constitution therefore both guarantees the right to differ, and the right to be different.

4. PEPUDA Amendment Bill

4.1 Analysis of relevant clauses

4.1.1 *Clause1(a): Redefining "discrimination"*

Clause 1(a) redefines what "discrimination" means in South African equality law. It brings about the legal fiction of *unintentional* discrimination. It further adds the *causing of prejudice* and *otherwise undermining the dignity of* someone as additional ways to unfairly (and now also unintentionally) discriminate. Finally, it replaces the notion that discrimination must be *based on* a prohibited ground, with the idea that it needs simply be *related to* such a ground.

Clause 1(a), almost without restraint, expands what qualifies as "unfair", into the realm of what previous and currently qualifies as "fair". This means it is redefining unfair discrimination out of constitutional bounds.

It is recommended that any reference to intention be removed. Discrimination is by its nature intentional and cannot be otherwise. To outlaw unintentional unfair discrimination has the potential to make any manner of ordinary social intercourse problematic. At all times, South Africans will need to be mindful of whether they are unintentionally discriminating against others in the ordinary course of their lives. This in fact has to potential to lead to intentional discrimination as a compensating mechanism.

"Indirect" and so-called "unintentional" discrimination are not the same phenomenon. Section 9 of the Constitution does recognise the existence of indirect discrimination. One indirectly discriminates against young children, for example, when one requires a computer programming job applicant to have a detailed portfolio of gainful past work. One is not directly stopping young children from applying for the post, but doing so indirectly by requiring them to implicitly have years of experience and advanced comprehension skills.

The prohibition of unfair indirect discrimination was adopted to disallow people from circumventing the prohibition on discrimination by dressing up their discriminatory conduct in euphemisms. Hiring only people with "British, Dutch, German, or French ancestry" would be the indirect way of discriminating against mostly black South Africans, and would fall foul of our positive constitutional law.

The principal Act already makes provision for the prohibition of unfair indirect discrimination, but the Amendment Bill adds the preposterous prohibition on unintentional discrimination.

Discrimination is by nature always intentional. One cannot accidentally discriminate. When one falls on the floor instead of on the bed, one did not "discriminate" against the bed in favour of the floor – it was unintentional. To discriminate is to choose one alternative over another, and there is no such thing as an unintentional choice. If the Amendment Bill introduces the notion of unintentional unfair discrimination, it would be redefining discrimination in a way not contemplated by the Constitution. This is plainly unconstitutional.

That discrimination needs no longer be "based on" one of the prohibited grounds, but now simply need be "related" to such a ground (which, it must be remembered, includes, per the principal Act, the perpetuating of systemic disadvantage or the undermining of human dignity). One can, therefore, *unintentionally* discriminate against someone else in terms of this proposed law, in a way that *relates* to the perpetuating of systemic disadvantage. In other words, the so-called discrimination will be so far removed from any concrete occurrence that allowing civil liability to arise in such an event is to pervert justice.

The new definition of discrimination directly threatens the right to freedom of association as entrenched in section 18 of the Constitution.

It is therefore further recommended, in addition to removing any reference to intention, to also restore the *status quo* that discrimination must be based on a prohibited ground, not merely related to it. Given that these modifications would render the entirety of the clause redundant, it is proposed that the entire clause be scrapped.

4.1.2 *Clause 1(b): Redefining "equality"*

Clause 1(b) redefines what "equality" means in South African equality law. Equality now includes "equal right and access to resources, opportunities, benefits and advantages" and "substantive equality".

The constitutional definition of "equality" is clear. As discussed above, according to the Constitution, equality means the law treats legal subjects equally and affords them equal protection and benefit, including full and equal enjoyment of constitutional rights and civil liberties.

It does not, however, include "access to resources, opportunities, benefits, and advantages" on an equal basis. This is a brazenly ideological, moreover socialistic, conceptualisation of equality that bears no relationship to the Constitution or to constitutionalism. This new definition of equality is especially problematic in light of concerns raised below.

It is proposed that any proposed change to the definition of equality in this clause be scrapped.

4.1.3 *Clause 2: Vicarious liability*

Clause 2 provides that an employer will be jointly and severally liable for the discriminatory conduct of their employees or agents. The only way to be shielded from this phenomenon is to take "reasonable steps to prevent" employees or agents from discriminating or otherwise contravening the law.

This clause is problematic on various grounds. Firstly, it denies the agency of employees or agents of others. The right to human dignity that in large part animates South Africa's constitutional democracy requires that individuals be regarded as individuals, who exercise free will and accept responsibility for the choices and decisions they take with that free will. Secondly, it forces employers and principals to assume their employees or agents are bigots who will discriminate against others. Whereas presently employers and principals regard their employees and agents as responsible adults, the Amendment Bill would require of them to regard their employees and agents as children who require constant supervision. This, too, undermines human dignity.

No person ought to be held responsible for the conduct of others, unless they contributed to or caused that conduct in a significant manner. It is per definition an injustice to hold otherwise. It is therefore recommended that this portion of clause 2 be scrapped.

4.1.4 *Clause 3: Prohibition of retaliation*

Clause 3 prohibits anyone from "retaliating" or threatening "to retaliate" against another for objecting to discrimination or threatening to institute proceedings in terms of the Act.

This clause does not define what is meant by "retaliation". Neither does the principal Act. This will cause unnecessary uncertainty and as a result fall foul of the Rule of Law standard at the centre of the Constitution. The consequence is that if someone's employment is terminated for constantly threatening to sue their employer, but never doing so and having a baseless case, that might be regarded as retaliation. Cases of this nature would waste the court's time.

It is recommended that "retaliation" be strictly defined and that a generous list of exceptions be included. Primarily, the prohibition on retaliation must not operate where there is "retaliation" for malicious and/or groundless threats and conduct.

4.1.5 *Clause 4: Duty to promote equality and eliminate discrimination*

Clause 4 provides that "All persons have a duty and responsibility to eliminate discrimination and to promote equality."

It is not specified whether this means in the context of their workplaces. In fact, the title of the provision in the principal Act suggests that it is a "general responsibility". In other words, all persons are now

required, in all their affairs, to promote equality and eliminate discrimination. Note that the responsibility is not to eliminate *unfair discrimination*, but discrimination (i.e., choosing between alternatives) *per se*.

It ought not be necessary to explain how this clause violates various rights in the Bill of Rights.

In light of the new definition of equality, and the obligation to eliminate (both fair and unfair) discrimination, this clause, if enacted, will essentially extinguish the rights to freedom of belief and opinion (section 15 of the Constitution) and freedom of expression (section 16).

No longer will South Africans be allowed to dissent from government's conceptualisation of equality (by no means a commonly accepted conceptualisation). In fact, they must promote that conceptualisation. Dissent from this conceptualisation might give rise to civil legal penalties, or perhaps even the withholding of permits or licences from government. In other words, government, through the Amendment Bill, will force all South Africans to become ideological socialists, or at least keep up the perception that they are.

More than that, South Africans will be required to eliminate the allowance to make choices. Any discrimination of whatever kind in any context must be eliminated by "any person" in South Africa. Choosing one intimate partner over the other, choosing baked means over peas, choosing to go to the movies rather than to a football match, are all choices that must now actively be eliminated by all people, organisations, enterprises, and government bodies. If they do not do so, as above, they might also be held civilly liable or be ineligible for permits or licences.

It cannot be recommended strongly enough that clause 4 be removed from the Amendment Bill.

4.1.6 *Clause 5(d): Addressing systemic inequality*

Clause 5(d) requires government to adopt measures to achieve equality by "proactively address[ing] systemic and multidimensional patterns of inequality and discrimination found in social structures, rules, attitudes, actions or omissions which prevent […] equal access to resources, opportunities, benefits and advantages and social goods".

It has already been pointed out that this conceptualisation of equality is unconstitutional. The Constitution does not envisage equal access to resources, opportunities, benefits, advantages, and social goods to be part of the right to equality. This is a political, ideological reconceptualisation of equality that is untenable as an enforced matter of law.

Should a provision such as this be adopted, the State will be under an active legal obligation to interfere directly in cultural and religious and personal affairs to eliminate natural, acceptable, and/or harmless forms of equality and discrimination. It must be emphasised here, too, that it is not unfair

discrimination that must be addressed, but discrimination (i.e., choosing between alternatives) *per se*. Much of what has already been written above is applicable *mutatis mutandis* here.

"Social goods", furthermore, is not defined, nor does it have an obvious ordinary meaning.

It is strongly recommended that at least this part of clause 5(d) be scrapped.

4.1.7 *Clause 8: Minister's discretion*

Clause 8 provides that persons contracting with the State must eliminate discrimination (again not *unfair discrimination*, see above) and promote equality, *inter alia* in line with ministerial regulations or codes of good practice.

There are no guiding criteria or circumscribing provisions that limit ministerial discretion. In other words, the Minister is free to decide whimsically and capriciously what they wish to include or exclude from the scope of an enterprise's obligation to promote equality and eliminate discrimination. This falls foul of the standard of the Rule of Law which requires that any executive discretion be defined and circumscribed by criteria in the enabling legislation itself.

It is submitted that the remainder of the Amendment Bill is sufficiently clear about the apparent and objectionable obligation to promote equality and prevent discrimination, that clause 8 is at best redundant, and at worst introduces more problematic aspects into an already problematic proposal. It is therefore recommended that clause 8 as a whole be scrapped.

4.1.8 *Clause 9: Duty to promote equality*

Clause 9 is in many ways a repetition of clause 4 as discussed above. It is unclear why an entirely new provision covering the same ground as an existing provision should be added. There is, in other words, an unnecessary duplication in the legislative scheme.

Clause 9 does, however, contain additional provisions.

It provides that "All persons, non-governmental organisations, community-based organisations or traditional institutions must promote equality in their relationships with other bodies and in their public activities" and that "the Minister who is responsible for the portfolio in which persons, non-governmental organisations, community-based organisations or traditional institutions […] operate must determine, by regulation or otherwise, the measures to be adopted and implemented; or issue a code of practice dealing with the elimination of discrimination and the promotion of equality, in respect of those persons, non-governmental organisations, community-based organisations or traditional institutions".

In other words, the Amendment Bill's requirement that all South Africans henceforth become ideological socialists promoting a particular political conceptualisation of equality, specifically includes civil society formations. Furthermore, the Minister may prescribe to these formations how they must promote this ideological conceptualisation of equality.

This provision evidently violates section 18 (freedom of association) as well as sections 15 (freedom of belief and opinion) and 16 (freedom of expression) of the Constitution, as it undermines the independence of the non-governmental sector, which includes civil society watchdogs and organisations that actively dissent from the present government's ideological convictions. Clause 9 renders civil liberty as a constitutional value dead-letter, if it is to be adopted. NGOs and civil society more generally must be allowed to be ideologically independent of the State.

Moreover, as above, no criteria has been set out in the Amendment Bill for how the Minister is to exercise their discretion. This falls foul of the Rule of Law standard.

Clause 9, additionally, allows the Minister to determine "different measures […] and different codes" to be "issued for different persons, non-governmental organisations, community-based organisations or traditional institutions, depending on their size, resources and influence".

In other words, the Minister may discriminate between persons in civil society based on their access to resources and to social capital.

This provision falls clearly foul of section 9 of the Constitution, which guarantees the right to equality of all legal subjects. The Minister will be enabled to discriminate and assign State favour to favoured entities and burden those which are not so favoured. For instance, government may impose particularly invasive codes or regulations on organisations that dissent from its ideological convictions while allowing those that agree to operate freely.

This gives rise to the fact that what is contemplated in clause 9 is not a law of general application. A law of general application, which is required by section 36(1) of the Constitution for a limitation of rights to be justifiable (as government will invariably argue the Amendment Bill is), means the law applies equally to all or applies equally within a class of persons. Class 9 allows the Minister to active discriminate between *specific persons*, which is the opposite of a law of general application.

It cannot be recommended strongly enough that clause 9 be scrapped.

4.2 Section 36(1) analysis

As should be clear from the above, the Amendment Bill limits in some way, shape, or form, at least the rights recognised in sections 9 (equality), 15 (freedom of religion, belief, and opinion), 15 (freedom of expression), and 18 (freedom of association), but could also have implications for sections 10

(human dignity), 12 (freedom and security of the person), 14 (privacy), 25 (property), 30 (language and culture), and 31 (cultural, religious, and linguistic communicates).

Having established that the Amendment Bill does infringe upon constitutional rights, it is now required to determine whether such an infringement is justifiable when measured against the requirements set in section 36(1) of the Constitution, which provides for how a limitation of constitutional rights must be justified. If the infringement(s) are not justifiable, the Amendment Bill would be unconstitutional.

4.2.1 *Law of general application*

The Amendment Bill has the appearance of a law of general application. However, in light of clause 9 as discussed above, which allows a minister to discriminate between persons and civil society entities based on their "size, influence, and resources", the *application* of the law might in practice not be *general*, but instead targeted and therefore unlawful. The suggestion that this clause be removed or revised bears repeating here.

4.2.2 *Reasonableness and justifiability*

The factors considered from 4.2.3 onwards below analyse the justifiability of the Amendment Bill. The bill'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 Amendment Bill as justifiable in an open and democratic society based on freedom, human dignity, and equality? In my view this would not be case, particularly as regards how the new definition of discrimination effectively threatens any social intercourse, and how the new definition of equality is a brazenly partisan and ideological one with ill-considered consequences.

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

4.2.3 *Open and democratic society*

An open and democratic society requires *openness*. This means that people must be free, and feel free, to engage – freely – with one another. As the discussion above about discrimination being part and parcel of human nature must illustrate, this engagement includes the allowance to discriminate, associate, and disassociate. It cannot be said that South Africa is an open society if such allowance is not made.

More fundamentally, however, the clauses that require of all persons, including particularly non-governmental organisations, to promote a specific, ideological conception of equality, and that empower ministers to prescribe, by regulation, how such promotion must take place, undermine the

open society in a drastic way. Constitutionalism requires that civil society be able to operate independently of political favour, and without fear of political reprisals for dissent and differences of opinion.

By effectively prohibiting ordinary South Africans and non-governmental organisations from differing with government about its ideological approach to equality, the Amendment Bill is not only infringing on freedom of expression as a constitutional right, and the independence of such organisations as an element of constitutionalism, but it also represents a threat to democracy in South Africa *per se*. The open and democratic society will come to an end when civil society must, in order to comply with the prescripts of law, promote a particular ideological conviction.

4.2.4 *Human dignity*

The open and democratic society must furthermore be based on human dignity. Human dignity, in the present context, is a difficult value to reconcile with either approach. In any alleged circumstance of discrimination, both the discriminator and the discriminatee's human dignity is at stake: It cannot be said that a person's dignity is being respected and advanced if they are prohibited from associating with those who wish to, and disassociating from those they wish not to. It also cannot be said that a person's dignity is being respected and advanced if they are not treated as an individual, but being discriminated against based on an inborn characteristic.[1]

In such circumstances it might be useful to distinguish between types of discrimination. As alluded to earlier, there is a marked difference in the nature of discrimination by the State, and discrimination by a private person. Discrimination by the State will in almost all circumstances have a deleterious effect on the human dignity of those it discriminates against, and this will be for a universal reason: The State owes everyone within its jurisdiction a duty of non-discrimination due to the nature of the social contract. Discrimination by a private person is however distinct. A private person does not, without active consent, owe a duty of non-discrimination to anyone, because the right to associate/disassociate is a fundamental aspect of liberty.

To the extent that the Amendment Bill, therefore, prohibits State discrimination, it is justifiable at this leg of the test. However, to the extent that it prohibits private discrimination, it is not. To the extent that the Amendment Bill empowers the State to discriminate, it is actively undermining human dignity and is furthermore unjustifiable for that reason.

4.2.5 *Equality*

The open and democratic society must also be based on equality. In form, the Amendment Bill is dedicated to the promotion of equality as it is conceived of in the Constitution. In substance, however,

[1] The other-than-inborn grounds of discrimination (i.e., those grounds over which persons have a choice) listed in section 1(xxii)(b) of the principal Act are problematic in themselves, and likely unconstitutional, for not being included in the constitutional definition of equality.

the Amendment Bill has redefined equality and loaded it with extra-constitutional baggage. It has already been noted why this is problematic and unconstitutional. Practically, the Amendment Bill's operation will undermine the achievement of constitutional, that is, legal equality, *inter alia* because it empowers ministers (as agents of the State) to discriminate on grounds of "size, influence, and resources" between persons and civil society entities as regards the application of codes of practice.

4.2.6 *Freedom*

The open and democratic society must also be based on freedom. It has already been established above that the Amendment Bill infringes on fundamental freedoms guaranteed by the Bill of Rights. Freedom necessitates the allowance to discriminate, associate, and disassociate. It also necessitates the allowance to form one's own view about the nature of equality (insofar as acting on that view is compatible with the Constitution) without government prescribing how one must so conceive. The Amendment Bill falls foul of each of these considerations.

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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.

4.2.7 *Nature of the right*

The importance and nature of the right to discriminate, associate, disassociate, and express views different to that of the ruling elite have been comprehensively discussed above. The Amendment Bill poses a substantial threat to the free exercise of these rights.

4.2.8 *Importance of the purpose of the limitation*

The purpose of the limitation is, in form, the prevention of unfair discrimination and the promotion of equality, both imperatives required by sections 1(a) and 9 of the Constitution. If these formal purposes were also the actual purposes of the Amendment Bill, it would be unassailable at this stage of the inquiry.

However, because the Amendment Bill *reconceptualises* the notions of discrimination and equality themselves out of constitutional bounds, this is not the case. The "unfair discrimination" and "equality" that the Amendment Bill contemplates, in other words, are not the same "unfair discrimination" that the Constitution requires to be prevented, and the "equality" that the Constitution requires to be promoted. The actual purpose of the Amendment Bill is to prevent ordinary, harmless forms of social intercourse and to unduly empower government functionaries to impose ideological convictions of the ruling elite upon society.

The importance of the *actual*, *substantive* purpose of the Amendment Bill, therefore, is negligible.

4.2.9 *Nature and extent of the limitation*

How invasive and how far-reaching is the limitation? The Amendment Bill's consequence is to place a question mark above every single social interaction that takes place in South Africa. This includes informal and formal debates, decisions to go out to have a drink or dinner with friends, decisions related to dating and intimacy between current and potential partners, commercial transactions and choices between alternative suppliers, etc.

Whether these forms of discrimination will continue to be "fair" will now be in serious doubt, particularly because discrimination can now be *unintentional*, need simply somehow *cause an impairment of dignity*, and need simply *relate to* a prohibited ground of discrimination. More particularly, the new, ideologically-laden conceptualisation of equality means people's entitlement to non-discrimination is significantly expanded. The range of fair examples of discrimination is therefore reduced, and the range of unfair examples of discrimination is expanded significantly.

The Amendment Bill therefore represents a substantial invasion of the constitutional rights of South Africans.

4.2.10 *Rationality of the limitation*

Rationality analysis asks whether there is a relationship between the limitation and its purpose. It has been established that there is a formal and a substantive purpose behind the Amendment Bill. For the purposes of this leg of the section 36(1) analysis, only the formal purpose, which must relate to a legitimate government purpose under the Constitution, is of relevance. In that respect, as has been established above, there exists no rational relationship between the prevention of unfair discrimination (as conceptualised in the Constitution) and the promotion of equality (as conceptualised in the Constitution), and the limitations represented by the Amendment Bill.

4.2.11 *Proportionality of the limitation*

Proportionality analysis asks whether the limitation is proportionate to the purpose it seeks to achieve. In other words, whether it can achieve the same purpose by less restrictive means.

The distinction between the actual and formal purposes of the Amendment Bill remains relevant here. It is submitted that to prevent unfair discrimination and promote equality, as these concepts are understood within the logic and basic structure of the Constitution, less restrictive means than the Amendment Bill, which is *totalitarian* in its regulation of social intercourse, are available. One such available means is the existing principal Act. Unfair discrimination has been prohibited in South Africa since the Constitution was adopted, and through the repeal of Apartheid legislation and the provision of basic services, the government has promoted equality. All these means were and remain readily

available. To regard them as insufficient simply because the drafters of the Amendment Bill have decided to redefine what discrimination and equality means would amount to a logical error in reasoning.

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It is submitted, in light of the preceding analysis, that the Amendment Bill's limitations on *inter alia* the constitutional rights to freedom of expression and association are unjustifiable in terms of section 36(1) of the Constitution.

ADDENDA

Addendum 1: Common law constitutionalism[2]

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.

[2] 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.[3] 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".[4] 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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[3] See https://dictionary.cambridge.org/dictionary/english/enshrine.

[4] 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[5]

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

[5] 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[6] 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.

[6] 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".[7]

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".[8]

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

The report also identifies four threats to the Rule of Law,[9] 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".[10]

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".[11]

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".[12] 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".[13]

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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[9] Good Law Project 29.
[10] Von Hayek FA. *The Constitution of Liberty*. (1960). Chicago: University of Chicago Press. 206. Our emphasis.
[11] Dicey AV. *Introduction to the Study of the Law of the Constitution*. (1959, 10th edition). London: Macmillan. 202-203.
[12] Dicey 184.
[13] 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.

Addendum 3: The right to enterprise

The Constitution must be read as a whole

Chaskalson J wrote for the majority of the Constitutional Court in *S v Makwanyane* that a provision of the Constitution "must not be construed in isolation, but in its context, which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular" other provisions in the chapter of which it is a part.[14]

This means that no part of the Constitution is left unaffected by other parts of the Constitution, especially the provisions of section 1 of the Constitution, which provide for the broad constitutional basis of South Africa. These provisions are said to permeate the whole Constitution. Per Chaskalson J in *Minister of Home Affairs v NICRO*:

"The values enunciated in section 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution".[15]

Section 1 of the Constitution provides:

> "Republic of South Africa
>
> 1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality **and the advancement of human rights and freedoms**.
>
> (b) **Non-racialism** and non-sexism.
>
> (c) **Supremacy of the constitution and the rule of law**.
>
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness." (our emphasis)

The emphasised portions of section 1 above proscribe racial discrimination absolutely, and makes freedom – the idea that individuals and groups of individuals must have the ability to make decisions for themselves without interference – an imperative in South African public policy.

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[14] *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at para 10.
[15] *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* 2005 (3) SA 280 (CC) at para 21.

Section 1(a) provides that the "advancement of … freedoms" is a value upon which South Africa is founded. This foundational value has the effect of strengthening every right in the Bill of Rights, as discussed below, which culminates into a right to enterprise. Whether or not South Africans should be free to make their own choices is not a question government gets to ask – it is a founding value and an imperative.

Non-racialism is, similarly, a Founding Provision and not a right in the Bill of Rights. Its absence from the Bill of Rights means that it is not available to limitation under section 36 of the Constitution, which enables the section 9 right to equal protection of the law to be limited. Thus, while equality between South Africans can be limited, **racial** equality is a constitutional imperative insofar as public policy relates.

This point is further reinforced by section 1(c), which provides for the co-equal supremacy of the Constitution and the Rule of Law.

The Rule of Law as a "meta-legal doctrine"[16] means in part that everyone subject to the law shall be governed by the same law, and not separate laws for separate people. If the latter occurs, the 'rule of man' reigns at the order of the day, whereby politicians and bureaucrats arbitrarily assign legal advantages to themselves and their constituencies at the expense of other citizens. The Rule of Law does not exist in such a state of affairs. Thus, there are two founding values which prohibit racial and sexist discrimination, *in addition* to section 9 of the Constitution, which theoretically allows for discrimination on *other* grounds.

The cumulative 'right to enterprise' in terms of the Constitution

There exists a cumulative right to enterprise in the Constitution that becomes clear once the principle enunciated by Chaskalson J is truly appreciated – that the Constitution must be read as a whole. The right to enterprise means that South Africans may, free from the interference of government and other actors, voluntarily go about their own business. This right to enterprise consists of various rights in the Bill of Rights (informed by the section 1(a) commitment to the advancement of freedoms):

Section 10 – the right to human dignity. In *Ferreira v Levin*, Ackermann J opined:

> "Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. **Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked.** To deny people their freedom is to deny them their dignity".[17] (our emphasis)

[16] Von Hayek FA. *The Constitution of Liberty*. (1960). Chicago: University of Chicago Press. 311.
[17] *Ferreira v Levin* 1996 (1) SA 984 (CC) at para 49

Section 12 – freedom and security of the person – especially sections 12(1)(a) and (c). These provisions provide that nobody may be deprived of freedom without just cause and that everyone has the right to be free from violence from both public and private sources. Violence must be understood as including the threat of violence, which underlies any new law or regulation such as the provisions of the present intervention.

Section 13 – freedom from slavery, servitude and forced labour. If South Africans are guaranteed the right to be free from slavery – forced employment – the converse is also logically true: South Africans are to be free from forced *un*employment as well, which is often the result of well-intended government policy.

Section 14 – the right to privacy. The right to privacy implies that persons or groups of persons may go about their businesses without the interference or surveillance of others – including and especially government – if they do so without violating others' rights. Such interference could include obliging the divulging of intimate personal or commercial details that a government ordinarily has no interest in knowing.

Section 18 – freedom of association. This right entitles everyone to associate (or disassociate) with whoever or whatever they wish on whatever basis. The provision was formulated without any provisos or qualifications and is therefore absolute insofar as it is not limited by section 36. South Africans may freely associate or disassociate as long as they do not violate the same right of others or any of the other rights in the Bill of Rights. Economic policy has a tendency to violate the freedom of association of enterprises, in South Africa often providing for forced racial association and disassociation.

Section 21(1) – freedom of movement. The freedom to move – leave, return, roam – is a vital element of enterprise.

Section 22 – freedom of trade, occupation and profession. The freedom to choose one's trade, occupation, and profession is, along with the property rights provision, the core of the right to enterprise. Section 22 provides that government may *regulate* (not *prohibit*) the practice (not the choice) of a profession. The regulation of practicing a particular profession cannot be so severe as to prohibit it.

Section 23 – labour relations. The Constitution guarantees the right of employees and employers to associate with trade unions and employers' organisations.

Section 25 – the right to property. There can be no right to enterprise, and no enterprise *per se*, without private property rights. Section 25, along with the freedom of trade, occupation and profession, forms the core of the right to enterprise and is a *conditio sine qua non* for South Africa's prosperity. A right to property supposes that the owners of the property in question may do with that property as they see fit, insofar as they do not violate the rights of others.