SAKELIGA

SELFSTANDIGE SAKEGEMEENSKAP

15 February 2021

TO: Portfolio Committee on Employment and Labour

ATTENTION: Zolani Sakasa
Committee Secretary

DELIVERED: By email:
equitybill@parliament.gov.za

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To whom it may concern,

COMMENT: EMPLOYMENT EQUITY AMENDMENT BILL, 2020

Sakeliga welcomes the opportunity to comment on the proposed Employment Equity Amendment Bill, 2020. We regard ourselves as well-placed to submit such a comment, as a great many of our almost 12 000 commercial members will be affected by the enactment of the proposed legislation.

We are concerned that the bill is harmful to public well-being and affected businesses' interests and runs afoul of constitutional standards and would therefore undermine not only the business environment but the whole of society.

We also provide various addenda that strengthen the brief comment below, and urge you to consider both the comment and the addenda together.

Should the opportunity arise, Sakeliga wishes to present oral evidence on the bill.

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1. Introduction

On 25 January 2021, the Portfolio Committee on Employment and Labour published the Employment Equity Amendment Bill, 2020, for comment. Sakeliga welcomes the opportunity to comment, and does so in this submission.

Sakeliga is an independent business community that promotes a healthy business environment – a market-based institutional framework within a public order based on constitutionalism. A great many of Sakeliga's nearly 12 000 members fit into the category of small enterprises. It is within this context that we regard ourselves as well-placed to provide insights into the shortcomings of the Employment Equity Amendment Bill (hereafter the "bill").

Sakeliga opposes racial considerations in matters of public policy as a matter of moral principle, constitutional legality, and commercial efficacy. It is harmful to society and indefensible for a government that taxes and regulates the conduct of all its citizens to pick and choose whom of those citizens to preference and whom to disadvantage. It is furthermore unconstitutional, given the Constitution's disapproval of race-based public policy. Finally, imposing political racial considerations onto economic actors gives rise to perverse incentives and distorts market signals and, eventually, leads to a lower standard of living for all South Africans, particularly poorer segments of society.

Given its harmful consequences, legal shortcomings, and moral concerns, Sakeliga regards the bill as ill-advised. This submission explains why with reference to specifically proposed clauses.

2. Employment Equity Amendment Bill, 2020

2.1 Numerical targets

Clause 4 of the bill provides for the determination of numerical targets to achieve demographic representivity in targeted economic sectors.

The Minister of Employment and Labour "may" by notice "identify" such sectors. Curiously, the Minister may also "prescribe criteria that must be taken into account in identifying sectors and sub-sectors". This is a perplexing provision, for the Minister is both the functionary who must prescribe the criteria and the functionary who must comply with that criteria. The Minister, in other words, is empowered to make rules for his or her own conduct.

This is impermissible in a legal regime that subscribes to the Rule of Law and the separation of powers. It is Parliament which must, in primary legislation, prescribe the criteria and requirements that must control the behaviour and actions of the executive, not the executive itself. Having the Minister make rules for him or herself undermines the very idea of a rules-based system.

The clause further provides the Minister "may" by notice "set numerical targets for any national economic sector identified", "for the purpose of ensuring the equitable representation of suitably qualified people from designated groups at all occupational levels in the workforce". Finally, any such notice may contemplate "different numerical targets for different occupational levels, sub-sectors or regions within a sector or on the basis of any other relevant factor".

This empowering provision contains no guiding or restraining criteria that circumscribes the Minister's powers. In other words, this clause bestows an unqualified discretion upon an executive functionary. As indicated above, Parliament has a duty to ensure executive conduct adheres to set standards, otherwise South Africans would be subjected to the rule of man as opposed to the Rule of Law. Without defining the limits of the Minister's power in the legislation there is cause for widespread uncertainty about the legal obligations and burdens that might be brought to bear upon economic actors.

More than that, however, the greatest issue facing this provision is its evident opening of the door to unconstitutional discrimination, just as the original Employment Equity Act that it amends has done.

Non-racialism is a fundamental postulate of the Constitution of the Republic of South Africa, 1996,[1] contained in section 1(b) – a founding value.[2] Section 9(1) of the Constitution further entrenches the right to equal treatment and benefit of the law to all South Africans, something this clause in particularly falls foul of. Section 9(2) of the Constitution guarantees that South Africans are entitled to full and equal enjoyment of the rights and freedoms guaranteed by the Constitution, and government may take measures to ensure this is the case. Clause 4 amounts to government taking a measure against this provision, as by implication not all South Africans will be enjoying the right to equality.

If government wishes to reverse the consequences of past racial discrimination, more racial discrimination is not the answer. Liberalising and deregulating the economic sectors identified by the Minister has a far greater likelihood of achieving justice, by ensuring more South Africans can participate in the formal economy without government barriers standing in the way.

We recommend that clause 4 (and by implication clauses 6 and 11) be removed from the bill.

2.2 Certificates of compliance

Clause 12 of the bill provides that the Minister "may only" issue a certificate of compliance (allowing employers to tender for State contracts) "if the Minister is satisfied that" *inter alia* the employer in question has complied with the set numerical targets discussed above. In other words, if an enterprise does not comply with the quotas determined by the Minister, they may not qualify for contracts with the State.

The potential chain-reaction throughout the economy and society at large that this might cause is cause for concern. An otherwise effective and economical enterprise, which might be the most fiscally affordable option in a tender process for a service provider to, for instance, provide food for hungry learners at rural schools, would be disqualified from doing so if it could not mechanically comply with arbitrary quotas set by the Minister. Thus, vulnerable schoolchildren suffer, and must make do with inferior service providers, because the better option did not toe the ideological line of government.

The prospect of not even qualifying for State contracts would certainly disincentivise foreign investors, which would also be required to comply with the numerical targets (and added compliance burdens) set by the Minister.

[1] Hereafter "the Constitution".
[2] See in this regard Addendum 2.

In line with our recommendation that the provision for the setting of numerical targets be removed, we recommend that this part of clause 12, too, be removed.

Moreover, the Minister's "satisfaction" is not a sufficient legislative standard to circumscribe their executive power. More substantive legal controls are necessary, as discussed above.

2.3 Lack of impact assessment

It is noteworthy and worrisome that either no socio-economic impact assessment (SEIA) was conducted on the bill, or none was published. If one were conducted but not published, it is even conceivably the case that it was determined that the socio-economic impact of the bill will be so deleterious that government cannot risk exposing this to the public, who would regard the impact as unacceptable. If no SEIA was conducted, government has engaged in the adoption of an economic intervention with potentially far-reaching consequences without attempting to quantify the scope of those consequences. In either case, government is in breach of the constitutional obligations of accountability and openness as encapsulated in sections 1(d) and 195 of the Constitution.

The memorandum to the bill explains that there are no implications for provinces and merely a R1,2 million cost implication for the Department of Employment and Labour. This is a gross oversimplification and a misrepresentation of the true state of affairs.

In the first place, how could government possibly have quantified the cost implications for this department if there is no accessible SEIA? One is forced to conclude that government did engage in some form of impact assessment but decided to keep this assessment from public view. If the only conclusion of that assessment is the implausibly conservative R1,2 million that the Department of Employment and Labour will bear, then the assessment is in any event incomplete and likely based on flawed premises and faulty research methodology.

In the second place, the implications for government cannot be limited to mere direct costs associated with the implementation of the provisions of the bill. With South Africa's economy in the process of all but collapse, it follows that adding the additional regulatory burdens contemplated in the bill to an already-beleaguered commercial sector will have significant tax revenue and economic growth implications.

It is eminently conceivable that a great number of businesses, particularly those on the margin where compliance with empowerment legislation is becoming an operational imperative, will expend unnecessary costs on attempting to lessen the burden that this legislative regime will impose upon them. This might include the establishment of expensive compliance divisions, and stalling growth to remain under the radar of the empowerment authorities. Both these potential events are destructive to the bottom line of those businesses themselves, to the prosperity of the communities they serve, and ultimately to the fiscus which relies on those businesses' growth, employment, and taxes.

3. Conclusion

As Sakeliga is recommending the removal of the two principal innovations in the bill – clauses 4 and 12 – it would be largely useless to enact what remains of the bill. In other words, we recommend that the Employment Equity Amendment Bill, 2020, as a whole be withdrawn. Moreover, we recommend

that South African statutory law in general be aligned with the non-racial promise of the Constitution forthwith.

Sakeliga submits that instead of this bill, the South African public, business community (and particularly small enterprises), and by implication the South African government, will be better served if an economic policy of *more business, less politics* is adopted.

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Addendum 1: Common law constitutionalism[3]

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.

[3] 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.[4] 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".[5] 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.

[4] See https://dictionary.cambridge.org/dictionary/english/enshrine.
[5] 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[6]

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 empowered to disregard the human rights and freedoms of the jobless in favour of those with trade

[6] 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.

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[7] 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.

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:

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

"[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".[8]

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".[9]

The report also identifies four threats to the Rule of Law,[10] the most relevant of which, for purposes of this submission, is the following:

[8] *Van der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC) at paras 65-66. Citations omitted.
[9] Good Law Project. *Principles of Good Law*. (2015). Johannesburg: Law Review Project. 14.
[10] Good Law Project 29.

> "[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".[11]

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".[12]

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".[13] 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".[14]

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.

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.

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[11] Von Hayek FA. *The Constitution of Liberty*. (1960). Chicago: University of Chicago Press. 206. Our emphasis.
[12] Dicey AV. *Introduction to the Study of the Law of the Constitution*. (1959, 10th edition). London: Macmillan. 202-203.
[13] Dicey 184.
[14] Dicey 198.

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.[15]

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".[16]

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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[15] *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at para 10.
[16] *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"[17] 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".[18] (our emphasis)

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

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

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.

Addendum 4: Competition policy and the law of unintended consequences

Competition as a market process

Competition develops as a natural outflow of the ever-fluid process of entrepreneurship in real-life markets. Apart from ensuring the contestability of markets, through the removal of legal obstacles, legal privileges, and monopolies in the public sector – all of which we regard as mostly of government's own making – competition requires little promotion through government policy.

We say this on the basis of the fact of entrepreneurs continually striving to provide consumers with goods and services they prefer. This is the basis of entrepreneurial success in contestable free markets. Even in relatively free markets the only way to attain and maintain any significant (and often precarious) market position is by serving consumers very well. In that sense a large market share is a reward for producing goods and services many people want to consume. Sylvestor Petro writes:

> "A free competitive market is not a condition which requires for its existence large numbers of producers. It only requires freedom on the part of all people to produce if and when they wish. If the unlikely situation should exist that in a certain line of production a single firm could most economically satisfy the whole market, then, of course, you would have a condition which might be called monopoly. But this is not the aspect of monopoly that people fear. **What really disturbs people about monopoly is not that a single person or firm has control over a commodity but that force, compulsion, or special privilege has been used to keep other people out**".[19]

Profits signal to entrepreneurs where resources are most urgently desired by consumers. This implies a **market process** of economic adjustment and entrepreneurship. Notions and evaluations of "static equilibrium conditions" is not very helpful when we regard the market as continually adjusting to changing conditions, technologies and consumer preferences.

However, in interventionist economies, legal barriers to entry are often established and do support conditions for harmful monopolies to arise. We consider these legal privileges as problematic and part and parcel in sustaining harmful regulatory monopolies in important sectors. It is these factors that, in our view, require the attention of competition authorities.

David Solomon writes:

> "[G]overnment's competition policy should be to remove the artificial props presently supporting these giant state monopolies and to subject them to competition from international colossi. [By] merely avoiding the erection of artificial barriers to entry, the government can

[19] Petro S. "Do Antitrust Laws Preserve Competition?". (1958). 5 *The Freeman*. 410. Our emphasis.

> facilitate an environment in which new and surprising changes in market structure can take place. No bill, [A]ct or tribunal is needed to accomplish this".[20]

We, therefore, support the repeal of laws and regulations which grant economic privileges to special interest groups and industries with regulatory government monopolies to subject these industries to market competitors.

The nature of competition policy

It should be noted from the onset that even among economists competition policy has always been contentious. Policy prescription on competition policy also differs widely among many pundits in the field. However, even mainstream "neo-classical" economists have raised important criticisms on many of the accepted notions of the competition policy and its enforcement. We briefly highlight some of these critiques to illustrate:

- Non-regulatory 'monopolies' may actually be beneficial for innovation and progress. Businesses making monopoly profits are able to invest those profits into new technologies and product development, which in the end may benefit consumers.
- In the absence of regulatory privileges a big market share is a reward for serving consumers' preferences. This is important, especially when we consider that, as we have argued in our previous submission, it is better to think of competition not as rival firms selling similar goods or services, but rather as individual firms competing with every possible other use of the consumer's money, which includes saving.
- Even just the potential for competition may play a role in driving businesses to keep prices down. In markets with few regulatory monopolies enterprises must remain ever vigilant of new competitors and new technologies, which may upset a market at any time
- Lastly, we emphasize that competition authorities do not have complete knowledge about all the dynamic, interrelated and multifaceted conditions of markets. For this reason, even well-intended interventions may go awry and cause failures of intervention, which harm consumers and producers (government failure as opposed to market failure).

From a strict natural rights perspective, however, each individual should have as much freedom as possible in the peaceful ownership, use and disposal of their property, including property owned in businesses. Dominique Armentano cogently illustrates a natural rights perspective of property as follows:

> "This [natural rights] perspective would hold that it is right to own and use property; it is right to employ that property in any manner that does not infringe on anyone else's property rights; it is right to trade any or all of that property to anyone else on any terms mutually acceptable; and that it is right to keep and enjoy the fruits of that effort".[21]

[20] Solomon D. "Whither competition policy?". (1998). Free Market Foundation Briefing Paper. 2.
[21] Armentano DT. *Antitrust and Monopoly: Anatomy of a Policy Failure* (Independent Studies in

At this juncture one has to be explicit about what competition policy assumes. Either by regulating prices, breaking up supposed monopolies, penalizing or restricting mergers or other commercial agreements, among others, governments assume the right to apply regulatory force to direct the utilization of private property and the market allocation of economic resources.

While regulators and governments assume – correctly or incorrectly – that governments do have the right to regulate private property through competition policy, we assume the exercise of this power cannot be arbitrary or absolute. For instance, while many consumers may appreciated an increase in the supply of services such as live music, which *ceteris paribus* should drive down the price and increase the quantities of these services provided, it would be gravely wrong, however, for bureaucrats to force musicians to increase their supply music services against their will through coercive state action. One must be careful not to allow competition policy to become vehicles of such wrongful coercion.

It is reasonable and perhaps even constitutional to suggest that any policy that interferes with the free and peaceful conduct of individuals on markets either as consumers or as producers must be thoroughly, reasonably and morally justified. Equality under our constitution, we suppose, should mean that both consumers and producers deserve equal treatment under the law.

A misapplication of competition policy clearly runs the risk of infringing on what some economists term the "self-sovereignty of individuals"; that is the right of individuals to exercise reasonable control over his or her person, actions and property. We deem it important to emphasize the self-sovereignty of both consumers and producers as a prerequisite for the formulation of reasonable rules for economic conduct.

Where such policies are developed, we contend, the onus should be on regulators to ensure that the rights of individuals both as consumers and as producers are protected and not harmed in competition policy. In this context, we deem it necessary to emphasize the constitutional cumulative right to enterprise (cf. Addendum 2)

Prof Duncan Reekie points to what we consider as a reasonable basis for competition policy:

> "[C]ompetition policy should be aimed at 'making markets work'. This is done by 'deregulating product and labour markets' and by 'removing government-imposed special favours resulting in entry barriers to industries and occupations'. This policy should, furthermore, commit South Africa to international free trade and privatise monopolistic State-owned enterprises by 'restoring the rights of ownership to the citizens of the country".[22]

Racial transformation

Political Economy). Independent Institute. Kindle Edition. 8.

[22] Reekie DW. *Monopoly and Competition Policy*. (2000, 2nd ed). Johannesburg: Free Market Foundation. 20.

In our estimation, competition policy is the wrong regulatory instrument to use for the purpose of racial transformation for at least three reasons.

Firstly, in our estimation, government has many other means less harmful to commerce than burdening producers with the potential for costly and likely dubious litigation for anti-competitive behaviour. Government can instead subsidise firms owned by historically disadvantaged persons without violating the rights of other firms. Ideally, government can liberalise the economy thoroughly by getting rid of red tape and State monopolies, thereby making entry for all firms, especially small firms inevitably owned by historically disadvantaged persons, easier. Finally, government can continue encouraging firms to transform, without threatening or actually using the violence force of law to compel it.

Secondly, we are of opinion that racialising competition policy will mean that this regime, with the inclusion of implied racial considerations for anti-competitive behaviour, will become increasingly arbitrary and unfair. Businesses may transgress provisions in such policy with no reasonable way of knowing it.

Thirdly, we think that infusing racial considerations into policy will force businesses in important sectors to increasingly make decisions on the grounds of less efficient non-market considerations. This may mean less efficient production of goods and services and harm to consumer welfare through a less efficient output of goods and services. This invariably harms the very poor and marginalised communities such policy is intended to help the most.

The truism of unintended consequences

The law of unintended consequences is an economic truism which dictates that every political interference in the market will, despite its intention, yield detrimental consequences that were likely unforeseen by the interventionists. These detrimental consequences will usually not be limited only to the targeted persons – private monopolies or big businesses in the case of competition policy – but will accrue to consumers.

Claude-Frederic Bastiat articulated the law of unintended consequences, writing that an intervention in the economy does not only give rise to one consequence, but to a series of consequences. "Of these effects, the first only is immediate; it manifests itself simultaneously with its cause – it is seen. The others unfold in succession – they are not seen: it is well for us if they are foreseen". Bastiat continued, arguing that the difference between a good and a bad economist is that the good economist takes account of all the consequences, and the bad economist merely takes account of the first, visible consequence.[23]

[23] Bastiat C-F. "What is Seen and What is Not Seen". In Ruper C (ed). *The Economics of Freedom*. (2010). Arlington: Students For Liberty. 1.

This was echoed years later by Henry Hazlitt, who wrote that economics can be reduced to one "lesson", and that lesson is:

> "The art of economics consists in looking not merely at the immediate but at the longer effects of any act or policy; it consists in tracing the consequences of that policy not merely for one group but for all groups".[24]

An example of this law is seen in the increasing corporate taxes. While the intention behind increasing the corporate tax rate is to increase government revenue for more social spending, the unintended consequences are that those companies subject to the increase will delay wage increases and likely increase the cost of their goods or services. Most worryingly, it may also induce them to delay employing more people. Only the increase in government spending on social services will be 'visible', and will certainly be touted by the government. The job losses and higher prices, however, which usually set in over time, won't immediately be traceable back to the increase in the corporate tax rate.

Absent the increased corporate tax rate, these companies will once again have more money at their disposal to pay their employees and lower prices.

[24] Hazlitt H. *Economics in One Lesson*. (2008 ed) Auburn: Ludwig von Mises Institute. 5.