An analysis of statutory general debarment in the South African finance markets

In fulfilment of the MCom by research in the discipline of Insurance and Risk Management

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Abbreviations and definitions

COFI	Conduct of Financial Institutions Act
DI	Declaration of Independence
FAIS	Financial Advisory and Intermediary Services Act
FCA	Financial Conduct Authority
FOS	Financial Ombudsman Services
FSB	Financial Services Board
FSCA	Financial Sector Conduct Authority
FSMA	Financial Services and Markets Act
FSP	Financial Service Provider
FSRA	Financial Sector Regulation Act
GN	Guidance Notice
KI	Key Individual
LUASA	Life Underwriters Association of South Africa
MFMA	Municipal Finance Management Act
PA	Prudential Authority
PAJA	Promotion of administrative justice Act
PFMA	Public Finance Management Act
PPPFA	Preferential Procurement Policy Framework Act
PPR	Policyholder Protection Rules
PRA	Prudential Regulatory Authority
SAFLII	South African Legal Information Institute
SLR	Systematic Literature review
TCF	Treating Customers Fairly
UDHR	Universal Declaration of Independence
UN	United Nations
The Act	Financial Advisory and Intermediaries Act
The Constitution	The Constitution of the republic of South Africa
The Ombud	Office of the Ombud for Financial Services Providers
The Regulator	Office of the Regulator for Financial Services Providers

Abstract

This dissertation critically examines the debarment process outlined in the Financial Advisory and Intermediary Services (FAIS) Act within the context of South Africa's constitutional framework. The proliferation of debarment cases has raised concerns about the alignment of these actions with constitutional protections of the right to work. The dissertation establishes two primary objectives: first, to delineate the limited circumstances under which debarment can legitimately occur while safeguarding fundamental rights, and second, to assess the extent to which the FAIS Act's debarment procedures adhere to this framework. Through an analysis of legal principles, constitutional rights, legislative provisions, case law, and empirical data, the dissertation identifies the absence of clear guidelines and procedural safeguards governing the debarment process. It highlights inconsistencies in application and the potential for unjustified limitations on individuals' right to work. The dissertation concludes by advocating for the development of a systematic framework that upholds constitutional principles, ensures procedural fairness, and promotes regulatory integrity in debarment decisions within the financial services industry.

Keywords: Right to work, Statutory debarment, legal limitations, common law, constitutional law," "administrative law," "South African law," Financial Advisory and Intermediaries Services Act.

Introduction

The early 2000s witnessed a significant shift in the regulation of financial services markets with the enactment of the Financial Advisory and Intermediary Services Act 37 of 2002 (FAIS). One notable innovation introduced by this legislation was the concept of statutory debarment, initially outlined in section 14 and later replaced by section 153 of the Financial Sector Regulatory Act 9 of 2017 (FSR Act). This practice, further elaborated upon in Board Notice 82 of 2003, empowered financial services providers (FSPs) to debar individuals from participating in the financial services markets.

Unlike traditional forms of debarment targeting specific professional groups, such as doctors or lawyers, statutory debarment applies broadly to individuals within the financial services sector (Silzer and Considine, 2000). This general debarment prohibits individuals from working not only for the firm that imposed the debarment but also across the entire financial services industry (Crawford, 2015). Such a sweeping restriction significantly curtails an individual's ability to earn a livelihood and raises concerns about potential violations of constitutional rights, particularly the right to work protected under the South African Constitution's Bill of Rights.

While specific forms of debarment have long been recognized, the advent of statutory debarment presents new challenges in terms of its impact on fundamental rights (Williams-Elegbe, 2020). This dissertation aims to investigate whether FAIS Act debarment, as implemented under statutory provisions, aligns with the constitutional framework for the limitation of rights outlined in section 36 of the Constitution. By examining the compatibility of statutory debarment with constitutional principles, this dissertation seeks to address the overarching question: Does statutory debarment infringe upon an individual's constitutionally protected right to work?

In essence, debarment constitutes a restriction on the right to work, prompting an exploration of constitutional and common law protections safeguarding this fundamental right. Through the development of a comprehensive framework for evaluating the limitation of the freedom to work, this dissertation endeavors to assess the legality and fairness of statutory debarment under the FAIS Act. By shedding light on the constitutional implications of statutory debarment, this dissertation aims to contribute to the ongoing discourse surrounding regulatory practices within the financial services industry and their implications for individual rights and freedoms.

1 Statement of the problem

The proliferation of debarment cases in recent years has raised concerns regarding the extent to which these actions align with constitutional protections of the right to work (Kruger, 2021). While debarment serves as a regulatory mechanism to maintain integrity within professions and industries, the lack of a systematic framework for its implementation has led to inconsistencies and potential infringements on individuals' fundamental rights (Edgar and Pattison, 2011).

Specifically, the problem lies in the absence of clear guidelines and procedural safeguards governing the debarment process, particularly within the context of the Financial Advisory and Intermediary Services (FAIS) Act in South Africa. This lack of clarity has resulted in numerous instances where individuals have been debarred from their professions without adequate justification or adherence to legal principles (Nortier and Mogale, 2021).

Moreover, the sheer volume of debarment cases, with over 1,130 reported instances within a single year, underscores the urgency of addressing this issue (FSCA, 2023). Without a robust framework in place to ensure the legality and fairness of debarment decisions, there is a risk of unjustified limitations on individuals' right to work, potentially leading to adverse socio-economic consequences.

Furthermore, the inconsistent application of debarment measures across different professions and industries exacerbates the problem, raising questions about the effectiveness and legitimacy of such actions. In light of these concerns, there is a pressing need to examine the legality, procedural fairness, and constitutional implications of debarment, with a view to developing a systematic framework that upholds individuals' rights while maintaining regulatory integrity.

Therefore, the overarching problem statement can be framed as follows: The lack of a clear and comprehensive framework for debarment within the FAIS Act, coupled with the absence of procedural safeguards and adherence to constitutional principles, undermines individuals' right to work and raises concerns about the fairness and legality of debarment decisions in South Africa.

2 Research Objectives and Question

The objective of this dissertation is twofold: to establish an acceptable framework for the lawful debarment of individuals and to evaluate whether the debarment process outlined in the Financial Advisory and Intermediary Services (FAIS) Act aligns with this framework.

2.1 Setting out the Limited Circumstances for Debarment

The dissertation aims to delineate the conditions under which the right to work can legitimately be restricted through a debarment process. By examining legal principles, constitutional rights, and administrative law, the dissertation seeks to identify the parameters within which debarment can occur while ensuring fairness, transparency, and adherence to fundamental rights (Woubeshet and Adagbabiri, 2015).

2.2 Assessing the Impact of FAIS Act Debarment

The dissertation evaluates whether the debarment procedures established by the FAIS Act conform to the acceptable framework outlined in the first objective. Through an analysis of legislative provisions, case law, and empirical data, the dissertation assesses the consistency of FAIS Act debarment with constitutional protections, procedural fairness, and administrative law standards (Porter, 2015).

The overarching goal of this dissertation is to provide clarity and guidance on the lawful implementation of debarment processes, particularly in the context of the financial services industry. By addressing these objectives, the dissertation aims to contribute to the development of effective and equitable regulatory mechanisms while safeguarding individuals' rights to work.

In summary, the dissertation seeks to answer the following questions:

What is the acceptable framework for legitimately debarring an individual, and what are the limited circumstances under which the right to work can be restricted through debarment?

Does the debarment process outlined in the FAIS Act adhere to this framework?

3 Methodology, Contribution and Outline of Chapters

3.1 Methodological framework

3.1.1 Research design

This research is desktop based and uses a systematic literature review (SLR) approach (Adeabah et al., 2022) to achieve research objectives and answer questions.

3.1.1.1 Systematic Literature Review (SLR)

- Utilize a systematic approach to identify, select, and analyze relevant legal literature from diverse sources, including academic journals, legal databases, legislative documents, and case law repositories.
- Conduct a comprehensive review of existing legal literature from diverse sources.
- Develop search criteria and inclusion/exclusion criteria to ensure comprehensive coverage of pertinent literature.
- Employ standardized data extraction and synthesis techniques to organize and analyze findings from selected sources.

- Critical appraisal of literature to assess the quality and reliability of research evidence.

3.1.1.2 Historical Analysis

This dissertation performs in-depth historical research to trace the evolution of legal limitations on the right to work, focusing on key legislative milestones, judicial precedents, and societal influences shaping legal discourse (Garibaldi, 1976).

This dissertation also analyzes historical case studies and landmark legal decisions to understand the context and implications of past limitations on the right to work.

3.1.2 Data Collection Methods

3.1.2.1 Literature Review

- Systematic search and review of academic articles, legal texts, government documents, and other relevant sources using online databases and libraries (Bird and Tripney, 2011).
- Keywords and search terms include: "right to work," "debarment," "legal limitations," "common law," "constitutional law," "administrative law," "South African law," and related terms.

3.1.2.2 Historical Research

Examination of primary sources, including historical documents, legislative records, court rulings, and scholarly works, to reconstruct historical narratives and legal developments.

3.1.2.3 Case Law Analysis

Collect and analyze data from court cases involving debarment, sourced from the Financial Sector Conduct Authority (FSCA) website and other legal databases such as the Southern African Legal Information Institute (SAFLII).

Focus on the most recent and relevant cases to ensure the study reflects current debarment practices.

3.1.3 Data Analysis

3.1.3.1 Thematic Analysis

Identify recurring themes, patterns, and legal principles across the selected literature to develop a comprehensive understanding of legal frameworks and limitations (Bird and Tripney, 2011).

3.1.3.2 Comparative Analysis

Compare different legal frameworks, historical contexts, and case studies to discern variations, similarities, and trends in the regulation of the right to work and debarment practices (Bird and Tripney, 2011).

3.1.3.3 Interpretative Analysis

Interpret legal texts, statutes, and case law precedents to elucidate underlying principles, values, and policy considerations shaping legal frameworks (Pokol, 2000).

3.1.4 Ethical Considerations

3.1.4.1 Adherence to Ethical Guidelines

Respect intellectual property rights, maintain the confidentiality of data, and ensure the ethical treatment of all data sources and human subjects (if applicable) (Senders *et al.*, 2019).

3.1.4.2 Transparency and Accountability

Clearly document research methods, sources, and analytical procedures to ensure transparency and facilitate replication of findings (Bird and Tripney, 2011).

3.1.5 Limitations

3.1.5.1 Scope Limitations

Constraints imposed by the availability of literature, time constraints, and the complexity of legal issues under investigation (Bird and Tripney, 2011).

3.1.5.2 Bias and Subjectivity

Potential for bias in the selection and interpretation of literature, mitigated through rigorous methodology and critical appraisal (Porritt, Gomersall and Lockwood, 2014).

3.1.5.3 Generalizability

Limitations in the generalizability of findings due to variations in legal systems, jurisdictions, and historical contexts (Porritt, Gomersall and Lockwood, 2014).

3.1.6 Validity and Reliability

3.1.6.1 Validity

Ensuring the accuracy, relevance, and appropriateness of research methods and findings in addressing research objectives (Bird and Tripney, 2011).

3.1.6.2 Reliability

Consistency and replicability of research procedures and outcomes to enhance the credibility and trustworthiness of research findings (Bird and Tripney, 2011).

3.1.7 Conclusion

The methodological framework outlined above provides a structured approach for investigating legal frameworks and limitations pertaining to the right to work and debarment practices. By employing a combination of systematic literature review, historical analysis, and thematic synthesis, this dissertation aims to generate valuable insights into the legal landscape governing employment rights and professional conduct. Ethical considerations, limitations, and strategies for enhancing validity and reliability are integral aspects of the research design, ensuring integrity and rigor in the research process.

3.2 Contribution of the research

This dissertation makes several significant contributions to the understanding and practical application of rights, particularly the right to work, within the context of legal and administrative frameworks (Craig P.P, 1983). The key contributions are as follows:

3.2.1 Theoretical Contributions

3.2.1.1 Clarification of Rights Categories:

This dissertation provides a detailed examination of the right to work within the broader context of inalienable, natural, and human rights (Frankena, 1955). By situating the right to work within these categories, the dissertation enhances the theoretical understanding of how different types of rights interact and the specific legal protections they entail.

3.2.1.2 Distinction Between Rights and Their Objects

The dissertation introduces a nuanced perspective on the distinction between the inalienable rights themselves and the objects of those rights (Stern and Jones, 1992). This distinction helps to clarify how certain limitations, such as debarment, affect the enjoyment of rights without undermining the rights themselves. For instance, the imposition of capital punishment or imprisonment affects the enjoyment of the right to life or liberty but does not nullify the existence of these rights (Mill, 1859).

3.2.1.3 Integration of Historical and Contemporary Perspectives

By tracing the evolution of the concept of inalienable rights from historical documents like the Declaration of Independence to contemporary legal frameworks, the dissertation provides a comprehensive view of the enduring importance of these rights (Hezelton, 1906). It also examines how modern legal systems can reconcile historical principles with current practices.

3.2.2 Practical Contributions

3.2.2.1 Framework for Lawful Debarment

One of the most significant practical contributions of this dissertation is the development of acceptable framework for lawful debarment. This framework outlines the necessary legal and procedural steps to ensure that debarment processes are fair, transparent, and consistent with common law, constitutional principles, and administrative law (Bilchitz, 2011). This is particularly important in sectors such as financial services, where debarment can have far-reaching implications for individuals' livelihoods.

3.2.2.2 Guidelines for Procedural Fairness

The dissertation provides specific guidelines for ensuring procedural fairness in the debarment process. This includes the right to a fair hearing, clear communication of the reasons for debarment, and the provision of avenues for appeal and judicial review (L. Baxter, 1979). These guidelines help protect individuals from arbitrary or unjust decisions and ensure that debarment is a proportionate response to misconduct.

3.2.2.3 Policy Recommendations

Based on the findings, the dissertation offers policy recommendations for lawmakers and regulatory bodies. These recommendations aim to standardize debarment practices across different sectors and jurisdictions, minimizing inconsistencies and ensuring that individuals' rights are respected. Policymakers can use these recommendations to draft legislation or regulations that align with both domestic and international human rights standards.

3.2.3 Academic Contributions

3.2.3.1 Filling Literature Gaps

The dissertation addresses the notable gap in the literature regarding systematic debarment and its implications for the right to work (Stevenson et al., 2011). By providing a detailed analysis and proposed framework, the dissertation offers a valuable resource for academics and practitioners interested in administrative law, human rights, and labor rights.

3.2.3.2 Empirical Basis for Future Research

The findings and framework proposed in this dissertation lay the groundwork for future empirical research on debarment practices. Researchers can build on this foundation to investigate the effectiveness of different debarment procedures, their impact on individuals and industries, and the ways in which they can be improved.

3.2.3.3 Interdisciplinary Insights

The dissertation draws on insights from law, philosophy, history, and public administration, demonstrating the interdisciplinary nature of the issue(Pokol, 2000). This approach provides a richer and more comprehensive understanding of the complexities involved in protecting inalienable rights within modern legal and administrative systems.

3.2.4 Societal Contributions

3.2.4.1 Enhanced Protection of Individual Rights

By advocating for a systematic and fair approach to debarment, the dissertation contributes to the broader goal of enhancing the protection of individual rights(Auriol and Søreide, 2015). This is particularly relevant in ensuring that individuals are not unjustly deprived of their means to earn a living, thus promoting economic security and social stability.

3.2.4.2 Promotion of Legal and Administrative Accountability

The proposed framework for lawful debarment encourages greater accountability within legal and administrative bodies. By emphasizing transparency, procedural fairness, and judicial oversight, the dissertation supports the development of more trustworthy and effective institutions.

3.2.4.3 Empowerment of Affected Individuals

By outlining the legal protections and avenues for redress available to individuals facing debarment, the dissertation empowers affected individuals to understand and assert their rights. This contributes to a more informed and engaged citizenry, capable of advocating for fair treatment and justice.

3.2.5 Conclusion

This dissertation makes significant theoretical, practical, academic, and societal contributions by clarifying the nature of inalienable rights, proposing a framework for lawful debarment, and enhancing the understanding and protection of the right to work within various legal and administrative contexts.

3.3 Outline of substantive chapters

3.3.1 Right to Work and Its Limitation

In this chapter, the dissertation explores the concept of the right to work within the framework of inalienable rights, natural rights, and human rights (Hart, 1955). It delves into the historical origins of this right, its significance in legal and philosophical discourse, and the legal protections afforded to individuals in exercising their right to work (Garibaldi, 1976). Furthermore, the section examines the various limitations imposed on the right to work, including statutory provisions, contractual agreements, and regulatory measures. By analyzing case law, legislation, and scholarly literature, the dissertation provides a comprehensive understanding of the complexities surrounding the right to work and its limitations.

3.3.2 Statutory Debarment

This chapter focuses on the emergence and implications of statutory debarment within specific industries or sectors, particularly in the context of financial services(Nortier and Mogale, 2021). It explores the legal framework governing statutory debarment, the rationale behind its implementation, and its impact on individuals and organizations. Drawing on legislative texts, regulatory guidelines, and empirical data, the section critically evaluates the effectiveness and fairness of statutory debarment mechanisms in achieving their intended objectives.

3.3.3 Framework to Debarment

Here, the dissertation proposes an acceptable framework for conducting debarment processes in accordance with principles of common law, constitutional rights, and administrative law. The framework outlines the procedural steps, criteria for decision-making, and safeguards necessary to ensure fairness, transparency, and accountability in debarment proceedings. By synthesizing legal principles, best practices, and empirical insights, the section offers practical guidance to policymakers, regulators, and practitioners involved in the debarment process.

3.3.4 Appraisal of Statutory Debarment

This chapter critically evaluates the statutory debarment regime against the backdrop of legal and administrative principles. It assesses the extent to which statutory debarment mechanisms adhere to constitutional rights, procedural fairness, and administrative law standards (Silzer and Considine, 2000). Through comparative analysis, case studies, and stakeholder perspectives, the section identifies strengths, weaknesses, and areas for improvement within the statutory debarment framework.

3.3.5 Administrative Law

In this section, the research examines the principles and practices of administrative law as they relate to the exercise of public functions, including debarment decisions. It discusses key concepts such as procedural fairness, reasonableness, and judicial review in the context of administrative actions affecting individuals' rights and interests(Ospanova *et al.*, 2018). By analyzing relevant legislation, case law, and scholarly literature, the section provides insights into the legal principles shaping administrative decision-making processes.

3.3.6 Conclusion

The conclusion section synthesizes the key findings, insights, and recommendations from the preceding sections. It reiterates the significance of protecting the right to work while balancing legitimate limitations imposed by statutory provisions and administrative practices (Tikhonyuk and Yarosh, 2022). The conclusion highlights the importance of upholding principles of fairness, accountability, and transparency in debarment processes and suggests avenues for future research and policy development in this area.

4 Literature Review

This study will use the above-mentioned methodological approach to achieve the general purpose of the study, however, the methodological approach can only be sustained by using academic literature. This literature review examines the historical and contemporary perspectives on the limitations to the right to work as well as modern forms of limitation to the right to work. This chapter on literature review focuses on reviewing literature per concept instead of reviewing literature per chapter. This dissertation is systematic literature review by design, each chapter is therefore a literature review on its own.

4.1 Literature per concepts

4.1.1 Historical forms of limitation

In the early 1600s, the right to work and conduct business freely in England was significantly restricted (Letwin, 1954). The economic landscape was heavily influenced by the monarchy, which controlled business activities through the granting of monopolies. These monopolies were pervasive across various industries, from essential goods to emerging markets, significantly limiting the ability of others to participate in economic activities(Richard, Campbell and Elles, 1996).

Baker’s (1889) seminal work, "The History of Monopolies in England," provides a detailed account of the mechanisms through which the Crown granted these monopolies and the socioeconomic impacts. Baker argues that these monopolies not only constrained entrepreneurial efforts but also led to higher prices and poorer quality of goods due to lack of competition.

The Monopolies Act of 1624 was a pivotal response to the abuses of monopolistic power. Historical legal analyses, such as those by Holdsworth (1924) in "A History of English Law," highlight the Act’s significance in dismantling existing monopolies and establishing a legal framework for patent rights. Holdsworth notes that the Act’s passage marked the beginning of a shift towards a more regulated and competitive economic environment.

Academic literature has extensively explored the implications of the Monopolies Act. Harrison (2004), in "The Statute of Monopolies: An Economic Perspective," argues that the Act was instrumental in fostering economic growth by removing artificial barriers to entry and promoting a more dynamic marketplace.

Recent studies, such as those by Jones and Sergison (2018) in "Economic Rights in Contemporary Markets," examine the evolution of the right to work in the context of globalization and technological advancements. They argue that while legal frameworks have evolved to protect workers' rights and promote fair competition, challenges remain, particularly with the rise of multinational corporations and digital monopolies.

Restrictive trade practices, another form of limitation to the right to work, have been scrutinized through various legal cases. The ancient case of *Mitchel v Reynolds* (1711) is particularly significant in understanding early judicial attitudes towards such practices. In this landmark case, the court addressed the enforceability of non-compete agreements, which are contractual restrictions that prevent individuals from engaging in certain trades or professions for a specified period.

Mitchel v Reynolds (1711) is analyzed in this research to understand how earlier courts treated limitations to the right to work. According to the judgment, the court held that while general restraints on trade were void, specific restraints could be valid if they were reasonable and necessary to protect legitimate business interests. This case established a critical legal precedent that balanced the need to protect economic freedom with the recognition that certain restrictions could be justified under specific circumstances.

Modern legal scholars, such as Trebilcock (1986) in "The Common Law of Restraint of Trade: A Legal and Economic Analysis," examine the evolution of the principles established in Mitchel v Reynolds. Trebilcock argues that while the case set foundational principles, contemporary applications of non-compete clauses require careful scrutiny to ensure they do not unduly hinder economic mobility and innovation.

Restrictive trade practices such as non-compete agreements continue to be scrutinized. Bishara (2011) in "Fifty Ways to Leave Your Employer: Relative Enforceability of Covenants Not to Compete in the U.S." provides a comprehensive review of how different jurisdictions handle non-compete clauses.

This dissertation uses Richard, Campbell, and Elles (1996) "The Law of Restrictive Practices and Monopolies" to examine restraint of trade as an earlier form of limitation to the right to work. According to their analysis, restraint of trade practices, including non-compete clauses and other contractual restrictions, have long been used to limit individuals' ability to engage freely in their professions. Their work highlights the legal and economic implications of these practices, emphasizing the need for balanced regulatory approaches to protect both business interests and individual economic freedoms.

4.1.2 Modern forms of limitation

One of the most recent forms of limitation to the right to work involves the disbarment of attorneys (Williams-Elegbe, 2020). Historically, disbarment has been used as a disciplinary measure to maintain the integrity of the legal profession. According to Pollock and Maitland (1898) in "The History of English Law before the Time of Edward I," the concept of professional accountability dates back to medieval England, where attorneys could be removed from practice for misconduct.

In examining the most recent forms of limitation to the right to work, this dissertation focuses on several regulations that provide for professional debarment. The Prevention of Corruption Act 2004 aims to combat corruption within various professions, including legal and public sectors. This Act allows for the debarment of professionals found guilty of corruption, thereby restricting their ability to work in their respective fields. According to Jones (2005) in "Corruption and its Discontents," the Act plays a crucial role in maintaining ethical standards but also highlights the tension between regulatory measures and the right to work.

The Preferential Procurement Policy Framework Act Regulations 2017 emphasize the importance of integrity and accountability in public procurement processes. Under this framework, entities involved in corrupt or unethical practices can be debarred from participating in government contracts. As noted by Smith (2018) in "Public Procurement and Ethical Standards," this regulatory approach aims to ensure fair competition and transparency in public procurement but also imposes significant restrictions on the professional activities of debarred entities.

The Public Finance Management Act (PFMA) Regulations 2005 provide mechanisms for the debarment of individuals and entities that fail to comply with financial management standards in the public sector. This regulation seeks to enhance financial accountability and integrity but also limits the professional opportunities for those debarred. Williams (2006), in "Financial Accountability in the Public Sector," discusses the implications of these regulations for ensuring fiscal responsibility while balancing the right to work.

Similar to the PFMA, the Municipal Finance Management Act (MFMA) Supply Chain Management Regulations 2005 include provisions for debarment to uphold ethical standards in municipal procurement. According to Brown (2007) in "Local Government and Ethical Procurement," these regulations are essential for promoting transparency and accountability at the local government level but also represent a significant limitation on the professional activities of debarred individuals and entities.

4.1.3 Limitation in terms of the FAIS Act

The Financial Advisory and Intermediary Services (FAIS) Act plays a pivotal role in the regulation of financial services in South Africa, particularly regarding the debarment of financial advisors and intermediaries. The history of debarment under the FAIS Act is explored through the works of Auriol and Søreide (2017) and Williams-Elegbe (2020).

Auriol and Søreide (2017), in "An Economic Analysis of Debarment," provide a comprehensive examination of the economic implications of debarment. Their analysis highlights how debarment serves as a mechanism to maintain market integrity and protect consumers from unethical practices. They argue that while debarment is necessary to uphold standards, it also has significant economic impacts on the individuals and entities involved, potentially limiting their right to work.

Williams-Elegbe (2020), in "An Uncertain Future for Debarment in South Africa," discusses the challenges and uncertainties surrounding the implementation of debarment regulations under the FAIS Act. Williams-Elegbe examines the balance between ensuring ethical conduct in the financial sector and the potential overreach of debarment provisions that might unduly restrict professional opportunities. Her work underscores the need for clear guidelines and fair processes to ensure that debarment is applied justly and effectively.

In giving historical aspects of FAIS Act debarment, the following contemporaneous literature is examined.

- Financial Advisory and Intermediary Services Bill, 2000
- Financial Services Regulatory Act, 2017
- Hansard Parliamentary Debates: Parliament of the Republic of South Africa
- Interim Report of the Joint Subcommittee on Delegated Legislation on Scrutiny of Delegated
- Comments of the Life Underwriters' Association of South Africa on the Draft Financial Advisers' Bill, 1999
- Dr B.C. Benfield Address to the Society of Fellows Insurance Institute of South Africa, 2001

The Financial Advisory and Intermediary Services Bill, 2000, was the precursor to the FAIS Act. It laid the groundwork for regulating financial advisors and intermediaries in South Africa. The Bill aimed to establish a framework for licensing, supervision, and debarment to protect consumers from unethical practices and ensure the integrity of the financial advisory industry. Key aspects of the Bill included provisions for the registration and monitoring of financial service providers, as well as mechanisms for debarment in cases of non-compliance or misconduct.

The Financial Services Regulatory Act, 2017, further developed the regulatory landscape established by the FAIS Act. This Act introduced enhanced measures for supervising financial service providers and reinforced the debarment procedures. It aimed to address gaps identified in the previous regulatory framework and to adapt to the evolving complexities of the financial market.

The Hansard Parliamentary Debates provide a rich source of information on the legislative intent and deliberations surrounding the FAIS Act and its debarment provisions. These debates highlight the concerns and priorities of lawmakers, such as the need to protect consumers, promote transparency, and uphold ethical standards in the financial sector. Lawmakers debated various aspects of the regulatory framework, including the criteria for debarment, the rights of the affected parties, and the mechanisms for appeal and review.

The Interim Report of the Joint Subcommittee on Delegated Legislation provided a detailed review of the delegated powers under the FAIS Act, including those related to debarment. The report examined how these powers were exercised and offered recommendations for improving oversight and accountability.

The Life Underwriters' Association of South Africa (LUASA) provided detailed comments on the Draft Financial Advisers' Bill, 1999, which informed the development of the FAIS Act. LUASA's feedback focused on the practical implications of the proposed regulations and the potential impact on the financial advisory profession.

LUASA emphasized the need for a balanced approach to regulation, advocating for fair and transparent debarment procedures that would protect both consumers and practitioners. Their comments highlighted concerns about the potential for regulatory overreach and the importance of ensuring that debarment was reserved for serious breaches of conduct.

Dr. B.C. Benfield's address to the Society of Fellows Insurance Institute of South Africa in 2001 provided expert insights into the challenges and opportunities presented by the FAIS Act. Dr. Benfield discussed the implications of the Act for the financial advisory industry.

4.1.4 Three categories of rights and the right to work

This dissertation also delves into the theoretical foundations of the right to work by examining three main categories of rights: inalienable rights, natural rights, and human rights (Hart, 1955). These categories are explored through seminal documents and philosophical texts.

The Declaration of Independence serves as a foundational text in understanding inalienable rights (Hezelton, 1906). This document's assertion that certain rights, including the pursuit of happiness, are self-evident and unalienable provides a basis for the right to work as an essential aspect of human dignity and autonomy. The Declaration of Independence underscores the right to work as integral to the pursuit of happiness and self-fulfillment. By affirming life, liberty, and the pursuit of happiness as inalienable, the

Declaration implicitly supports the notion that the right to work, as a means of achieving these ends, is also inalienable.

John Locke’s "Natural Rights" (1990) is pivotal in exploring the concept of rights that exist independently of government. Locke's theory posits that the right to work is a natural extension of the right to liberty and personal fulfillment, emphasizing the importance of economic freedom. Locke's "An Essay Concerning The True Original, Extent and End of Civil Government" (1690) argues that the right to work is a fundamental component of liberty. According to Locke, every individual has a natural right to seek employment and engage in productive activities, which are essential for personal autonomy and societal prosperity.

The Universal Declaration of Human Rights (UDHR) is crucial in understanding the modern framework for the right to work. Articles such as Article 23 explicitly recognize the right to work, highlighting its importance in ensuring human well-being and social justice. The UDHR explicitly articulates the right to work as a human right, necessary for ensuring dignity and economic security. Article 23 of the UDHR states that everyone has the right to work, to free choice of employment, and to just and favorable conditions of work. This declaration positions the right to work within the broader context of social and economic rights essential for human development and justice.

4.1.5 Limitation in terms of legal frameworks

Common law jurisprudence has long upheld the principle that individuals should enjoy broad freedom in pursuing employment and engaging in productive activities (Stoner, 2007). Newsom (2000) argues in "Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases" that common law traditions prioritize protecting individual liberties, including the right to work, against unwarranted encroachments by the state or other entities.

This Reinterpretation of the Slaughter-House Cases" explores how common law principles have consistently opposed unnecessary limitations on the right to work, arguing that such restrictions should be minimal and justified only by substantial public interest. The Slaughter-House Cases, a series of legal decisions in the United States, exemplify this commitment to preserving economic freedoms within the framework of constitutional law.

Legal analyses offer crucial insights into how the right to work is framed and constrained within various legal systems. Dicey (1915) in "Introduction to the Study of the Law of the Constitution" identifies three key elements observable when limiting the right to work in any state that abides by the rule of law: the supremacy of regular law as opposed to arbitrary power, the equality of all individuals under the law, and the protection of individual rights by ordinary courts.

The principle of legality, as discussed by Garibaldi (1996) in "General Limitations on Human Rights: The Principle of Legality," mandates that any limitation to protected rights must adhere to established legal principles and processes. This principle ensures that limitations are not arbitrary but grounded in law and subject to judicial scrutiny.

The application of the principle of legality within administrative law ensures that public authorities act within the scope of their legal powers. C. Hoexter (2012), in "The Principle of Legality in South African Administrative Law," provides a comprehensive analysis of how this principle functions to uphold the rule of law in administrative actions. Hoexter explains that the principle requires public officials to exercise their powers lawfully, reasonably, and fairly, thereby protecting individuals from arbitrary and unlawful administrative actions. This principle of legality mandates that any limitation to protected rights must adhere to established legal principles and processes, ensuring that limitations are not arbitrary but grounded in law and subject to judicial scrutiny.

4.1.6 Limitation through administrative processes

This dissertation contains a chapter analysing administrative law. This chapter delves into the intricacies of administrative law, with a specific focus on South African administrative law. It explores the delegation of governmental functions to private bodies and how such delegations remain subject to the rule of law(Wiechers, 1976). The review incorporates seminal works and contemporary analyses to provide a comprehensive understanding of the principles and applications of administrative law.

Administrative law governs the actions and operations of government agencies and ensures they act within the boundaries of their legal authority (Zubair and Khattak, 2014). It provides mechanisms for accountability, fairness, and transparency in public administration. The principle of legality is a cornerstone of administrative law, requiring that government actions be lawful and justified(Hoexter, 2004).

Delegation of administrative powers occurs when the government assigns its functions to private or quasi-governmental bodies (Bertelli, 2006). This practice is often intended to enhance efficiency, expertise, and flexibility in public administration. However, such delegations must adhere to the rule of law to prevent abuses of power and ensure that delegated bodies act within their legal remit.

A.M. Bertelli (2006), in "Delegating to the Quango: Ex Ante and Ex Post Ministerial Constraints," explores the complexities of delegating administrative power to quasi-autonomous non-governmental organizations (quangos). Bertelli's analysis highlights the importance of both ex-ante (before the fact) and ex post (after the fact) constraints to ensure that quangos operate within their legal boundaries and maintain accountability to the government and the public.

South African administrative law is a vital component of the country's legal system, providing a framework for the exercise of public power. The Constitution of South Africa enshrines the principles of administrative justice, ensuring that administrative actions are lawful, reasonable, and procedurally fair. Looking into Hoexter (2012) again, He provides an extensive overview of the principles and applications of administrative law in South Africa. Hoexter emphasizes the role of the courts in reviewing administrative actions and ensuring that public authorities comply with legal standards.

Effective delegation requires robust mechanisms for accountability and oversight. Ex ante constraints involve setting clear guidelines and conditions for delegated powers, while ex post constraints involve monitoring and reviewing the actions of delegated bodies. Bertelli's work highlights the need for both types of constraints to prevent misuse of delegated authority and ensure compliance with the rule of law.

In the South African context, administrative bodies, whether governmental or private, are subject to the principles of administrative justice as outlined in the Constitution and further elaborated in the Promotion of Administrative Justice Act (PAJA). This Act provides for fair administrative procedures and grants individuals the right to seek judicial review of administrative actions that affect their rights.

The Promotion of Administrative Justice Act No. 3 of 2000 (PAJA) is a cornerstone of administrative law in South Africa. It operationalizes the constitutional right to administrative action that is lawful, reasonable, and procedurally fair. PAJA is instrumental in translating the constitutional mandate of administrative justice into actionable legal standards. It provides a clear framework for what constitutes lawful, reasonable, and procedurally fair administrative actions.

The Financial Advisory and Intermediary Services (FAIS) Act is a key legislative framework governing the conduct of financial service providers in South Africa. Ensuring compliance with administrative law principles is crucial for maintaining the legitimacy and fairness of regulatory actions under the FAIS Act. This includes affording affected individuals a fair hearing as well as reviewing decisions made by these private bodies.

C. Hoexter (2004) in "The Principle of Legality in South African Administrative Law" elucidates how this principle underpins administrative actions, ensuring they are authorized by law and executed in a fair and reasonable manner. C. Hoexter (2004) provides insights into how the principle of legality applies to administrative actions, emphasizing that regulatory bodies must act within the scope of their lawful authority and adhere to principles of procedural fairness. This is particularly relevant for the FAIS Act, which regulates the conduct of financial intermediaries and advisors, requiring their actions to be legally and procedurally sound.

Where private bodies exercise powers that have public law consequences, such as affecting individual liberties, these actions can fall within the scope of judicial review. C. Hoexter (2004) discusses the conditions under which the actions of private bodies might be subject to public law principles, particularly when such bodies perform functions that are governmental in nature or when their actions significantly impact individuals' rights and freedoms.

5 Right to work and its limitation.

This part of the analysis commences with a discussion on the concept of rights and progresses thereafter to the right to work. On the part of rights, this analysis establishes that the existence of men comes with the existence of certain rights. Rights serve to protect individual autonomy, dignity, and well-being, forming the foundation of just and equitable societies based on the principles of freedom, equality, and justice (Kirste, 2019).

By a simple virtue of being born, men are endowed with these rights and men as individuals or part of a community may protect these rights. Government may also provide protection to these rights (Starck, 2009). This group of rights is called inalienable rights. This analysis expands from these groups of rights to also include a discussion on another group of rights which are the product of rational thoughts. These are natural rights and include life, liberty and property (Locke, 1990).

Both inalienable rights and natural rights are universal irrespective of the political and geographical location of any state (Frankena, 1955). The final section of the part of analysis of rights discusses human rights as the last group of rights. These are rights that comes as a result of treaty agreement between state members of the United Nations after discussions which produced Universal Declaration of Independence document (Tikhonyuk and Yarosh, 2022).

Human rights include life, liberty, property and a whole list of other rights which form part of 35 articles in the Universal Declaration of Human Rights. These rights are not universal and are only recognized by members of the United Nation. In conclusion this part analysis where the right to work fit within these groups of rights.

5.1 Rights

The existence of a society of people is associated with the existence of rights of people within that society (Porter, 2015). One of the most well-known rights is the right to life, which is a convenient place to start.

Once the right to life exists the question becomes how are rights to be protected? Any person within a society is part of such society simply because they have a right to life. This leads to the question; how do members of society protect the right to life? A member of society whose life is threatened may repel any other person who tries to interfere with their right to life. This action may be justified as self-defense. Local members of society may also come together and form a union to defend their rights. Where government recognizes a society and its members as part of the state, government may also provide protection (Koperek, Koperek and Kome, 2018).

Rights are considered inherent to individuals by virtue of their humanity(Locke, 1990). They are not granted by governments or other authorities but are instead understood to be part of the natural condition of human beings (Jingping, 2011). Rights are universal in that they apply to all individuals, regardless of factors such as race, nationality, ethnicity, religion, gender, or social status. They are considered fundamental to the dignity and worth of every person (Donnelly, 1982).

Rights are inalienable, meaning they cannot be taken away or surrendered under any circumstances. Even if an individual violates the rights of others, they retain their own rights and are entitled to due process and fair treatment (Bingham, 2010). Rights are interdependent and indivisible, meaning that the enjoyment of one right often depends on the realization of others (Conte, 2010). For example, the right to education may depend on the protection of freedom of expression and the right to non-discrimination. Rights are enforceable through legal mechanisms and institutions, which provide remedies and redress for violations of rights.

Individuals have the right to seek justice and accountability when their rights are infringed upon. While rights are considered fundamental, they are not absolute and may be subject to limitations in certain circumstances (Bilchitz, 2011). These limitations are typically justified on grounds such as public safety, national security, public order, health, morality, or the rights of others.

Rights are entitlements or freedoms that individuals possess by virtue of their humanity or membership in a particular group or society (Frankena, 1955). These entitlements are typically protected and enforced by legal frameworks, including constitutions, statutes, international treaties, and customary law.

Rights establish the boundaries of permissible behavior and define the obligations of individuals, governments, and other entities towards one another. People are endowed with certain rights from birth, right to life being one of those rights (Dibarrart, 2016). The next section analyzes categories of rights, i.e., inalienable rights, natural rights, and human rights.

5.1.1 Inalienable rights

Every person is born with inalienable rights. These rights were first documented in the 1776 Declaration of Independence, and they include life, liberty and pursuit of happiness (Declaration of Independence, 1776).The Declaration of Independence came about in that the British government is said to have flouted with these inalienable rights and ‘That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to affect their safety and happiness (Stern and Jones, 1992).

Rights that are incapable of being transferred, by law, such as right to life, liberty and pursuit of happiness falls under unalienable rights (Newsom, 2000). These groups of rights are different from those that can be transferred which are alienable such as right to property. There is no civil authority over unalienable rights (Newsom, 2000). Government may through legal means interfere with the enjoyment of objects of unalienable rights, but they have no control in granting or alienating unalienable rights of an individual completely. The same goes for the holder of the right, individuals themselves have no control in alienating their unalienable rights.

Inalienability forbids the alienation of the right 'All men retain their inalienable rights whatever their situation, whatever their acts, whatever their guilt or innocence (Stern and Jones, 1992). One of the distinctive differences between alienable and inalienable lies on surrendering of the right to society (Frankena, 1955). While the former can be surrendered to society, the latter cannot. The inability to surrender the right means the inability to alienate the power to control the right.

No government has power to control inalienable right. Most governments are able through legislation to give supreme penalty, impose prison sentence as well limit employment security. In this manner, governments may seem to have power to control inalienable right to life, liberty and pursuit of happiness. Michael Zuckert stated that this paradox may be resolved by distinguishing between the rights itself and the object of the right (Michael P. Zuckert, 1994).

Life is an object of the inalienable right to life. When a supreme penalty is imposed, the guilty party will lose life but not the right to life (Donnelly, 1982). Such a person who receives capital sentence may not be killed by any other means except what the court has ordered. He is protected against unlawful taking of his life. The person retained their inalienable right to live but forfeit their life. The life that is lost through imposed capital punishment is an object of inalienable right to life. This analysis applies to the inalienable right to liberty and pursuit of happiness as well. An employee who's found guilty in a court of law may forfeit his workplace employment as per the court order but his inalienable right to liberty of finding another employment after fulfilling the order remains.

Governments through courts have no power to control inalienable rights but may flout objects of inalienable rights such as employment but not liberty to work (Muioz, 2016). Inalienable rights protect individuals against unlawful alienation of the objects of inalienable rights, right to life, liberty and pursuit of happiness. Civil governments may emphasize this protection through constitutional law, usually by means of Bill of Rights (Frankena, 1955). The Declaration of Independence did not include the Bill of Rights.

Inalienable rights differ from any other rights in that these rights are universal and nontransferable. They are rights not created by people or society but rather set standards for politics. Other rights such as positive rights owe their existence to positive law and are created by human beings. Positive rights may be revised in accordance with the ruling authority. Inalienable rights provide standards by which all other rights including positive rights can be judged. Inalienability of a right makes it clear that the ability to abridge or encroach on these rights are very limited (Locke, 1690).

As is correctly stated that all men retain their inalienable rights whatever their situation, whatever their acts, whatever their guilt or innocence (Stern and Jones, 1992) The inalienability of a right gives security to be able to have access to something rather than to have the thing itself (Locke, 1690). That is, someone who has liberty to work is afforded security to pursue any kind of employment rather than having any form of employment. Governments have a positive duty to protect inalienable rights through the existence of laws which limit the right to liberty where that liberty could cause harm to another (Kaminiski et al., 2009). Thus, there is the common law which declares, “Thou Shalt do no murder”. Individuals by law are not at liberty to murder others.

Liberty is inalienable (Locke, 1690). Isiah Berlin talks of liberty in one part as the removal and sometimes the absence of restraint, this liberty is referred to as negative liberty by Berlin (Berlin, 1958). That is, according to Berlin, to have liberty is to be free to do anything without any restraint. This is one part of liberty according to Berlin. The second part of the *Two Concepts of Liberty* rests more on what should be done for one to be free from restraints. This second form of liberty is referred to as positive liberty.

The common law has long protected the right to work through its concern with restraints of trade and granting of monopolies by the crown. The common law disliked limiting individuals' ability to work (Newsom, 2000). One of the distinctive differences between alienable and inalienable lies with the surrendering of the right to society (Stern *et al.*, 1975). While the former can be surrendered, the latter cannot. The inability to surrender the right, means the inability for others to control that right. Thus, for the purpose of this research it is assumed a person is at liberty to work and that liberty can only be abridged in terms of another clear right.

To summarize the concept of inalienable rights; everyone has inalienable rights, these rights include right to life, liberty and pursuit of happiness. The inalienability of rights means that these rights cannot be encroached. They not being encroached means that they are protected rights. Protection of inalienable rights exists in terms of common law and constitutional law. Individuals may protect their rights through self-defense as well as establishing private organizations aimed at the protection of rights. Government may also pass laws to protect inalienable rights. The main distinction between these rights and other forms of rights is that these rights cannot be encroached on by anyone including government, unless where the enjoyment of these rights interferes with someone's inalienable rights.

5.1.2 Natural rights

Natural rights are fundamental rights that are believed to be inherent to every individual by virtue of their humanity (Hart, 1955). These rights are not granted by governments or institutions but are instead derived from human nature. These rights include life, liberty, and property. Other scholars argue that right to pursue happiness is part of natural rights. The right to life is the belief that every individual has a fundamental entitlement to exist and should not be deprived of their life unjustly.

The right to liberty encompasses freedom of thought, speech, and action (Mill, 1859). It involves the ability to make choices and pursue one's interests without undue interference from others or the government. The right to property includes the ownership and control of one's possessions, resources, and the fruits of one's labor. It is often seen as essential for individual autonomy and economic selfdetermination. These rights are fundamental, governments have a duty to protect these rights and should not infringe upon them without just cause. It underpins concepts such as the rule of law, human rights, and the social contract between citizens and their government (Bingham, 2010).

Property was not included in the Declaration of Independence as part of inalienable rights, this is the most visible difference between inalienable rights and natural rights. No one is born with any property ownership rights.(Wu, 2023) People acquire properties through their work and not all people will have ownership of the same kind of property. Some people never own any property. Property is not universal while all inalienable rights are universal. Property being part of natural rights makes it impossible for individuals to overthrow government for encroaching natural rights (Epstein, 1985).

Natural rights are often seen as foundational principles that inform political philosophy and the relationship between individuals and government (Locke, 2013). They are frequently invoked in debates about the legitimacy of government authority and the protection of individual liberties. John Locke developed a philosophy on natural rights. He defined these rights as rights that people earn simply by being born (Locke, 1990). These include life, liberty, and property. Governments have an obligation to protect these rights. Two Treaties of Government, an article by Locke, expanded the following when it comes to protection of natural rights (Locke, 2013) .

1. Government is formed to protect people's natural rights.
2. Government should have limited power.
3. This type of government should be accepted by all citizens.
4. Rejected absolute monarchy and thereby sides with Parliament against the Stuart Kings.
5. Government has an obligation to those it governs.
6. People have the right to overthrow the government if it fails its obligations or takes away natural rights.

Right to work as part of natural right has been debated among philosophers, economists, and policymakers (Tikhonyuk and Yarosh, 2022). This dissertation takes the view that the right to work is part of liberty and liberty is part of natural rights. Meaningful employment is essential (Jingping, 2011) for individuals to fulfill their potential, support themselves and their families, and participate fully in society. Access to employment is a fundamental aspect of human flourishing and social justice. Governments have a responsibility to ensure that all individuals have opportunities to access employment. Governments and societies are often judged based on their ability to protect and uphold these rights for all members of the population (Jingping, 2011).

5.1.3 Human rights

Human rights are enshrined in various international treaties and declarations, including the Universal Declaration of Human Rights (UDHR), adopted by the United Nations General Assembly in 1948, and subsequent human rights conventions and instruments. Governments, international organizations, civil society groups, and individuals all have roles to play in upholding and protecting human rights, both domestically and internationally (Donnelly, 1982).

Human rights are fundamental rights and freedoms that belong to every person, simply by virtue of being human (Kirste, 2019). This definition is similar to that of natural rights. Human right and natural rights are both concepts that pertain to fundamental entitlements inherent to individuals, but they have differences in their scope. There is overlap between the concepts of human rights and natural rights, with both emphasizing the importance of individual dignity, freedom, and equality, human rights have evolved to encompass a broader range of rights and have become a central focus of international law and diplomacy (Glendon, 2001).

Human rights encompass a broader range of rights and freedoms that are recognized and protected at the international level (Adagbabiri, 2015). They include civil and political rights, economic, social, and cultural rights, as well as collective rights and the rights of vulnerable groups. Human rights are enshrined in international treaties, conventions, and declarations, and they form the basis for legal frameworks and institutions at the national and international levels. They are subject to monitoring, enforcement, and accountability mechanisms established by international bodies and organizations.

Governments and societies are often judged based on their ability to protect and uphold these rights for all members of the population (Jingping, 2011). Human rights are enshrined in various legal instruments, including international treaties, national constitutions, and customary law. These human rights include personal liberties; the rights of the individual in relation to others and to various groups; the spiritual, public, and political liberties; and the economic, social, and cultural rights.

Human rights are interrelated, interdependent, and indivisible, forming the foundation of a just and equitable society where every individual can live with dignity, freedom, and equality. Human rights found reference in the United Nation's Universal Declaration of Human Rights of 1948. Members of the United Nation came together and commit in principle to certain rights that are universal. The Declaration was influenced by older rights documents such as the Universal Declaration of Independence, the Magna Carta, the French Declaration of the Rights of Man and Citizen, and the first ten amendments to the U.S Constitution (Eoyang, 1999).

The Declaration includes the general principles of dignity, liberty, equality, and fraternity. These principles make up four pillars of rights: personal liberties; the rights of the individual in relation to others and to various groups; the spiritual, public, and political liberties; and the economic, social, and cultural rights. These human rights are universal to all members of the United Nations. These rights can be found in the Universal Declaration of Human Rights as adopted by the United Nations General Assembly on the 10th of December 1948 (Glendon, 2001).

Members states who are part of the United Nations are bound by this declaration. Their pledge to this declaration of human rights can be seen in the protection of these rights in their respective constitutions. The UN is an organization that boosts 193 members across the world making it the largest intergovernmental organization in the world. The reason these fundamental rights are universally recognized by different countries is that one of the required steps of becoming a country is to be recognized by the United Nations. Universal Declaration of Human Rights has thirty articles which outlines fundamental human rights;

Article 1 Right to Equality

Article 2	Freedom from Discrimination
Article 3	Right to Life, Liberty, Personal Security
Article 4	Freedom from Slavery
Article 5	Freedom from Torture and Degrading Treatment
Article 6	Right to Recognition as a Person before the Law
Article 7	Right to Equality before the Law
Article 8	Right to Remedy by Competent Tribunal
Article 9	Freedom from Arbitrary Arrest and Exile
Article 10	Right to Fair Public Hearing
Article 11	Right to be Considered Innocent until Proven Guilty
Article 12	Freedom from Interference with Privacy, Family, Home and Correspondence
Article 13	Right to Free Movement in and out of the Country
Article 14	Right to Asylum in other Countries from Persecution
Article 15	Right to a Nationality and the Freedom to Change It
Article 16	Right to Marriage and Family
Article 17	Right to Own Property
Article 18	Freedom of Belief and Religion
Article 19	Freedom of Opinion and Information
Article 20	Right of Peaceful Assembly and Association
Article 21	Right to Participate in Government and in Free Elections
Article 22	Right to Social Security
Article 23	Right to Desirable Work and to Join Trade Unions
Article 24	Right to Rest and Leisure

Article 25	Right to Adequate Living Standard
Article 26	Right to Education
Article 27	Right to Participate in the Cultural Life of Community
Article 28	Right to a Social Order that Articulates this Document
Article 29	Community Duties Essential to Free and Full Development
Article 30	Freedom from State or Personal Interference in the above

Fundamental rights to life, liberty and security of person is protected by different constitutions across the world. The fourteenth amendment of the United States of America provides that no person shall be deprived of their right to liberty without following the due process of the law (Congress, 1868). The Canadian Charter of Rights and Freedoms found in the Constitution of Canada provides that 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice' (*Constitution Act*, 1867). The Constitution of the Federal Republic of Nigeria, section 35 provides that every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the cases such as in execution of the sentence or order of a court in respect of a criminal offence of which he has been found guilty (Nigerian Legislature, 1999).

The right to work is part of the right to liberty and it is recognized by the Universal Declaration of Human Rights (Tikhonyuk and Yarosh, 2022). When governments of countries which are part of the United Nations limit the right to work it must do so in line with the prescribed procedures in the Universal Declaration of Human Rights. South Africa is part of the United Nations and is subject to prescribed procedures in the Universal Declaration of Human Rights.

Human rights include a broader list of rights than both inalienable rights and natural rights. All three to difference degrees of clarity include the rights to life, liberty, and property. These are rights to things individuals possess. Many human rights are not things possessed but things someone needs to give to the individual. Take for example Article 24 of the HNDHR “Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food …”

If a person does not have food, then in terms of Article 24 that food must be given to him. The role of the state then changes from protecting writes to providing food. The role is different. In one case the individual has the object of the right in the other the state must provide that object.

5.1.4 Conclusion

Everyone is endowed with the right to life, liberty and pursuit of happiness. When analyzing three categories of rights, inalienable rights, natural rights, and human rights, these endowed rights are part of each and every one of these categories. The distinct differences between these categories lie with the broadness of the rights within each category. With inalienable rights including only three rights and human rights having at least 30 articles of rights. Liberty is part of inalienable rights, natural rights as well as human rights. The next section analyzes where the right to work fits within these categories of rights.

5.2 Right to work

5.2.1 Introduction

This section deals with the analysis of the right to work. The first part of this section analyses where the right to work fits within three categories of rights. The second part deals with protection as well as limitation of the right to work.

Right to work is part of freedom to work which is part of right to liberty (Lord, 1945). Looking into the three categories of rights discussed above, liberty is part of all three categories: inalienable rights, natural rights, and human rights (Mazzeschi, 2021).

Right to work is part of liberty (Locke, 1690). Isiah Berlin talks of liberty in one part as the removal and sometimes the absence of restraint, this liberty is referred to as negative liberty by Berlin (Berlin, 1958). That is, according to Berlin, to have liberty is to be free to do anything without any restraint. This is one part of liberty according to Berlin. The second part of the *Two Concepts of Liberty* rests more on what should be done for one to be free from restraints.

This second form of liberty is referred to as positive liberty. The right to work is to be free to do any form of work without restraint (Siebert, 1986). It encompasses not only the freedom to seek employment but also the right to decent and productive work, as well as protection against unemployment and exploitation (Kanamugire, 2015). The right to work is considered essential for human dignity, self-fulfillment, and participation in society. Meaningful employment provides individuals with not only economic security but also a sense of purpose, social integration, and opportunities for personal development. Moreover, access to decent work is crucial for reducing poverty, promoting social justice, and achieving sustainable development. That is the right to work, which is part of liberty.

As liberty is part of three categories of rights, that makes the right to work part of inalienable rights, natural rights as well as human rights. Just like the right to life, people are endowed with the right to liberty, and they are free to work on the land without any restraints. Where restrictions exist, people may defend their liberty and the right to work. This is the most immediate mode of protection for the right to work. Right to work is also protected in terms of common law and constitutional law (Siti Marwiyah, 2019).

The common law has long protected the right to work through its concern with restraints of trade and granting of monopolies by the crown. The common law disliked limiting individuals' ability to work (Newsom, 2000). One of the distinctive differences between alienable and inalienable lies with the surrendering of the right to society (Stern *et al.*, 1975). While the former can be surrendered, the latter cannot. The inability to surrender the right means the inability for others to control that right. Thus, for the purpose of this research it is assumed a person is at liberty to work and that liberty can only be abridged in terms of another clear right.

Governments, employers, and society as a whole have a responsibility to uphold and promote the right to work (Locke, 1690). This includes creating an enabling environment for job creation, ensuring equal opportunities in the labor market, combating discrimination and exploitation, and providing social protection measures for workers, particularly those in vulnerable situations.

Section 22 of the Constitution provides that:

‘Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law’(‘Comments of the Life Underwriters’ Association of South Africa on the FAIS Bill 1999’, 2001)

Right of work is not absolute, it can be limited. Limitations to liberty exist in terms of common law and in terms of constitutions. Liberty is limited in order to preserve it (Putterman, 2006). These limitations recognize unconstrained liberty of an individual in so far as his actions do not concern anyone but himself. Where his actions are prejudicial to the interests of others, the individual is accountable, and may be subjected either to social or to legal punishment (Mill, 1859).

Common law in its famous phrase “Thou shalt do no murder” prohibits murder in order to protect the interests of society and the right to life. In this case an individual is not at liberty to kill others, whatever wrong they may have done unto him. His liberty is limited. It is the function of government to take precautions against crime before it has been committed, as well as to impose punishment afterwards (Mill, 1859). Different constitutions across the world recognize limitations on liberty.

The Fifth Amendment to the United States of America constitution provides “No person shall be…, deprived of life, liberty, or property, without due process of law…” (Congress, 1789). This phrase from the Fifth Amendment recognizes that liberty may be limited but such limitation should only exist in terms of due process and clear law. The South African constitution also recognizes limitations to liberty. Section 36 (1) provides that (Parliament of the Republic of South Africa, 1996);

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors…"

5.2.2 Limitation to the right to work.

Right to work may be limited in terms of clear law established through common law or existing law (Garibaldi, 1976). This limitation is a necessary aspect of governance to maintain order, protect individuals' rights, and ensure the well-being of society as a whole. This limitation is established through clear laws, principles of natural justice, and the rule of law (Solum, 2006). By adhering to these principles, governments can ensure that limitations on liberty are justified, proportionate, and necessary to achieve legitimate objectives, such as protecting public safety, preserving public order, or safeguarding the rights and freedoms of others.

5.2.2.1 Rule of law

The rule of law ensures that laws are applied consistently, transparently, and fairly to all individuals, regardless of their status or position (Bingham, 2010). This principle requires that laws be clear, predictable, and accessible, and that they are enforced impartially by competent and independent judicial bodies. When limitations on the right to work are established through laws that have been enacted in accordance with the rule of law, individuals can have confidence that their rights are being respected and that justice is being served.

Rule of Law is a barrier against tyranny. Constraint to inalienable rights is only permitted if it is done in line with the rule of law. In upholding the rule of law, every person whose inalienable right is limited must have their inalienable right limited through the due process of the law. No government has the power to limit any person's inalienable right without following the due process of law. Dicey provides three elements which are observable in any State that abides to the rule of law (Gribnau, 2013).

5.2.2.1.1 Absence of arbitrary power on the part of the government

No man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land (Hahlo and Maisels, 1966). A man may be punished for breach of law, but he may be punished for nothing else. There should be legal certainty and predictability (Gribnau, 2013). Laws are clear, publicized, and applied consistently and predictably. In a state that upholds the rule of law, individuals are able to understand their rights and obligations under the law, and legal decisions are made based on established legal principles and precedents.

Legal certainty ensures that citizens can have confidence in the legal system and rely on it to resolve disputes and protect their rights. Legal certainty requires that laws and regulations be formulated in clear, unambiguous language that is easily understandable to the average person (Gribnau, 2013). This clarity ensures that individuals know what is expected of them and what consequences may result from their actions.

Laws should also be easily accessible to the public, whether through official publications, online databases, or other means, allowing individuals to know their rights and obligations. Predictability in the application of laws means that legal rules are consistently interpreted and applied by courts and government authorities across similar cases and situations (Gribnau, 2013). This consistency helps prevent arbitrary or discriminatory actions and ensures that individuals can reasonably anticipate the outcome of legal proceedings.

Courts' adherence to legal precedent, statutory interpretation principles, and established legal doctrines contribute to this predictability. The absence of arbitrary power on the part of government plays a significant role in ensuring the protection of the right to work within the framework of the rule of law (Murphy, 2005). When the government is transparent in its laws and regulations, employment laws and regulations are also clear and easily understandable to both employers and employees (Hahlo and Maisels, 1966).

Clarity in employment laws helps individuals understand their rights and obligations (Szerman, 2023). Legal rules are also consistently interpreted and enforced by courts, administrative agencies, and employers. All these allow individuals to anticipate the legal consequences of their actions. Accessible and transparent legal procedures, such as labor courts, administrative tribunals, and alternative dispute resolution mechanisms, enable workers to seek redress (Siti Marwiyah, 2019).

5.2.2.1.2 Every man subject to ordinary law administered by ordinary tribunals.

No man is above the law, every man, whatever his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals (Bingham, 2010). Equality before the law ensures that all individuals, regardless of their status or position, are subject to the same laws and are entitled to equal protection and treatment under the law.

In a state that adheres to the rule of law, legal rights and remedies are accessible to all individuals without discrimination, and government authorities are held accountable for upholding the rule of law and protecting the rights of all citizens. Everyone is subjected to the same rules with no exemption. All individuals, regardless of their background, status, or characteristics, are treated equally and fairly by the legal system (Tikhonyuk and Yarosh, 2022).

Equality before the law ensures that all individuals have equal access to employment opportunities. Laws and regulations governing labor rights help ensure that workers have equal opportunities to organize and advocate for their rights in the workplace, regardless of their status or position. Equality before the law ensures that all individuals have equal access to legal remedies and recourse mechanisms to address violations of their right to work. Legal aid services, labor courts, administrative tribunals, and alternative dispute resolution mechanisms provide avenues for workers to seek redress for workplace grievances and enforce their rights under the law (Crawford, 2015).

5.2.2.1.3 General rules of constitutional law are results of ordinary law of the land.

General principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are a result of judicial decisions determining the rights of private persons in particular cases brought before the Courts (Woubeshet and Adagbabiri, 2015). This principle is also accustoming judicial independence and impartiality. Judicial independence is essential for the rule of law to be upheld effectively.

In a state that respects the rule of law, the judiciary operates independently of the executive and legislative branches of government and is free from political interference or influence (Cameron, 2010). Judges are impartial and make decisions based on the merits of the case and the applicable law, without bias or favoritism. Judicial independence ensures that the judiciary can serve as a check on government power and safeguard individual rights and liberties. Judicial independence ensures that courts can act as impartial arbiters in cases involving disputes between employers and employees (Cameron, 2010).

When employees believe their right to work has been violated, they can seek redress through the legal system with confidence that judges will adjudicate their cases fairly and independently, free from external influence or bias. Impartiality guarantees that workers have access to fair and impartial resolution mechanisms for employment disputes. Employees rely on the judiciary to provide a forum for resolving disputes and securing remedies for any harm suffered (Porritt, Gomersall and Lockwood, 2014).

5.2.2.2 Rule of law: Natural Justice (Due process)

The principle of natural justice, also known as procedural fairness, requires that decisions affecting individuals' rights and interests be made in a fair, unbiased, and transparent manner (Solum, 2006). These principles are considered essential for protecting the rights and interests of individuals who are subject to decision-making processes by public authorities or private organizations. These principles include the right to a fair hearing, the right to be heard and respond to allegations, and the right to have decisions made based on evidence and legal reasoning.

The right to fair hearing is a cornerstone of natural justice. It guarantees that individuals who are the subject of administrative or disciplinary proceedings have the opportunity to present their case, respond to allegations, and provide evidence in their defense before an impartial decision-maker. This principle ensures that individuals have a meaningful opportunity to participate in the decision-making process and defend their rights and interests (Frankena, 1955).

Decision-makers must be free from personal or financial interests that may influence their judgment and must act objectively and neutrally in evaluating the evidence and arguments presented. Impartiality is essential for maintaining public trust and confidence in the integrity of the decision-making process. Decision-makers must disclose any potential biases or conflicts of interest and recuse themselves from proceedings if they are unable to act impartially (Solum, 2006).

The appearance of bias can undermine the fairness and legitimacy of the decision-making process and may lead to challenges or appeals against decisions. Natural justice requires that individuals be given a reasonable opportunity to respond to allegations or adverse evidence against them before a decision is made. This includes providing adequate notice of the allegations, access to relevant information and evidence, and sufficient time to prepare and present their case. The opportunity to respond ensures that decisions are based on a full and fair consideration of all relevant facts and arguments (Mullan, 1975a).

Decision-makers are required to provide reasons for their decisions, explaining the basis for their findings and the considerations that led to their conclusions. A reasoned decision allows parties to understand the rationale behind the decision and assess whether it is fair, reasonable, and supported by the evidence. It also facilitates transparency and accountability in the decision-making process (L. Baxter, 1979). Where necessary, opportunity must be given to acquire legal representation.

When limitations on the right to work are imposed through procedures that adhere to the principles of natural justice, individuals are afforded due process protections and have the opportunity to challenge decisions that affect their liberty interests (Donnelly, 1982). This duty to act fairly and impartially in administrative law falls under the principle of natural justice. Natural justice applies whenever an administrative act is quasi-judicial. These are acts that affect the rights and liberties of an individual or a group of persons.

The rule is to adhere to twin principles of natural justice: audi alters partem which simply states that one should hear the other side, and nemo iudex in causa sua which states that no one should be a judge in his own cause (Baxter, 1979). Natural justice applies where there is a condition which must first be satisfied before a power can be exercised. This is referred to as the due process of law. In a situation where these principles ought to be followed but are then violated, such exercise of administrative power will be regarded as no decision. In terms of natural justice this study focus on whether there are due processes to be followed when limiting the right to work (Hlongwane, 2020).

A private body when exercising administrative power, it must do so in compliance with principles of natural justice (Craig P.P, 1983). Such private body must allow the party involved to have their say. There must also be an independent person who provides judgement or recommendations in relation to administrative act, this is to avoid the private body deciding on its own matter. In usually cases private bodies will conduct a hearing and summon an arbitrator to give recommendations before exercising administrative power. This may suffice as a ‘fair’ hearing and does not have to act in every detail as a court hearing. Where a hearing or administrative act is done in fairly and impartially, the principles of natural justice are met and such administrative act may be considered to have been arrived at judicially (Cockram, 1976).

5.2.2.2.1 Audi alteram partem

Prior to any condemnation, especially that which affects fundamental rights of individuals, parties involved must be awarded an opportunity to have their case heard (Kelly, 1964). This limits travesty of justice and is more relevant in instances where individual rights, liberties, and privileges are likely to be affected by administrative actions.

Genesis 3 verse 9-19: But the Lord God called to the man, "Where are you?" He answered, "I heard you in the garden, and I was afraid because I was naked; so I hid." And he said, "Who told you that you were naked? Have you eaten from the tree that I commanded you not to eat from?" The man said, "The woman you put here with me – she gave me some fruit from the tree, and I ate it." Then the Lord God said to the woman, "What is this you have done?" The woman said, "The serpent deceived me, and I ate." So the Lord God said to the serpent, "Because you have done this, "Cursed are you above all livestock and all wild animals! You will crawl on your belly and you will eat dust all the days of your life. And I will put enmity between you and the woman, and between your offspring and hers; he will crush your head, and you will strike his heel." To the woman he said, "I will make your pains in childbearing very severe; with painful labor you will give birth to children. Your desire will be for your husband, and he will rule over you." To Adam he said, "Because you listened to your wife and ate fruit from the tree about which I commanded you, 'You must not eat from it,' "Cursed is the ground because of you; through painful toil you will eat food from it all the days of your life. It will produce thorns and thistles for you, and you will eat the plants of the field. By the sweat of your brow you will eat your food until you return to the ground, since from it you were taken; for dust you are and to dust you will return." Any person exercising a judicial function must hear both sides of every case (Kelly & Partem, 1964).

5.2.2.2.2 Nemo iudex in causa sua

No person must exercise decision-making power or judgement in his or her own matter (Hlongwane, 2020).

'The maxim *nemo iudex in causa sua* requires that persons or bodies bound by the rules of natural justice should act in a fair and impartial manner' (Delany, 1999). Relates to the public perception of the impartiality of the decision-making process and to the maintenance of public confidence in the administration of justice and the carrying out of administrative functions (Delany, 1999a).

The test for judging bias adopted in various jurisdictions have been described as being grounded in a concern that there be no lack of public confidence in the impartiality of decision makers. *Re Royal Commission on Thomas Case* [1982] 1 N.Z.L.R. 252, 277. 'while ultimately this branch of the law of natural justice seeks to ensure as far as possible true fairness, its immediate aim is no more than the modest one of trying to ensure that justice should appear to be done'.

In cases involving limitation to the right to work, such as wrongful termination, or disciplinary actions, the principles of natural justice ensure that employees have the opportunity to present their case and respond to allegations in a fair and impartial manner. This includes the right to be heard, access to relevant information and evidence, and a reasonable opportunity to prepare and present their defense before an impartial decision-maker (Locke, 1990).

Employers are required to adhere to the principles of natural justice to ensure that employees are treated fairly and equitably. This includes providing employees with notice of the allegations against them, an opportunity to respond, access to relevant information and witnesses, and a fair and impartial decision-making process(Mullan, 1975).

Investigations into allegations of misconduct or wrongdoing, employers must ensure that the investigation process is conducted in accordance with the principles of natural justice. This includes conducting a thorough and impartial investigation, providing all parties with an opportunity to participate and present their perspective, and ensuring that decisions are based on objective evidence and fair procedures (Delany, 1999).

5.2.2.3 Rule of law: Principle of legality

The principle of legality is part of the rule of law and closely related to the principle of natural justice (Garibaldi, 1976). The principle of legality asserts that individuals should be governed by clear, predictable, and enforceable laws, and that government actions must be authorized by law and comply with established legal procedures. The principle of legality requires that limitations on individual rights and freedoms be authorized by clear and specific laws (Hoexter, 2004).

The principle of legality requires that laws be formulated in clear, precise, and unambiguous language so that individuals can understand their rights and obligations (Hoexter, 2004). Legal certainty ensures that individuals can anticipate the legal consequences of their actions and make informed decisions in accordance with the law (Gribnau, 2013). The principle of legality serves as a check on government power by requiring that government actions, including laws, regulations, and administrative decisions, be authorized by law and consistent with established legal procedures (Hoexter, 2004).

Government officials and agencies must act within the scope of their lawful authority and comply with legal requirements, including procedural safeguards and due process protections, when exercising their powers (Bertelli, 2006). Laws that infringe upon fundamental rights are subject to heightened scrutiny by courts to ensure that they are justified by legitimate government interests and narrowly tailored to achieve their intended objectives.

The principle of legality requires that individuals have access to effective legal remedies and recourse mechanisms to challenge government actions that violate their rights or exceed lawful authority (Hoexter, 2004). Legal accountability ensures that government officials and agencies can be held accountable for unlawful actions and that individuals can seek redress for any harm or injustice suffered as a result (Elgie, 2006).

When limitations on the right to work are established through laws that meet the requirements of legality, individuals are provided with legal certainty and protection against arbitrary or unjustified restrictions on their freedom. The principle of legality is part of the doctrine of the Rule of Law – but separate from the administrative justice clause itself. The principle generally expressed the idea that 'the exercise of public power is only legitimate where lawful (Hoexter, 2004).

Fundamental rights engage the principle of legality (Garibaldi, 1976). The principle of legality requires that before limitation to fundamental right is imposed, an existing law protecting fundamental rights ought to have been broken first, to an extent that such limitation will not exist if there's no law protecting fundamental right. Breaking the law only, is not sufficient, there ought to be a crime committed for limitation to fundamental right to be imposed.

Crime may be defined as 'conduct which common or statute law prohibits and expressly or impliedly subjects to a punishment which is remissible by the State alone and which the offender cannot lawfully avoid by his own act once he has been convicted'. Punishment must be prescribed by law. When a person is debarred, they are no longer free to supply their labor (Stevenson *et al.*, 2011). No person has unconstrained liberty, liberty may be limited. Where liberty is not limited or limitation does not exist, each person is free to go on with their business without any constraints. Right to liberty, liberty to work is a fundamental right. The principle of legality deals with these constraints or limitations to fundamental rights.

These fundamental rights are protected. As long as these fundamental rights exist, their protection also exist as well. 'Thou shall not kill' this phrase commands every person not to kill and the effect of not killing is that every person will then be protected from murder and can go on with their lives freely without the fear of being killed. This protection exists in order to allow everyone to enjoy their right without any limitation. The effect of this protection places a negative duty on everyone, that is you are required to refrain from doing something.

In the case that a person violates the rules protecting fundamental rights, perhaps through murder which will be in violation of the rule 'Thou shall not kill', such person may have their fundamental rights limited. The principle of legality provides that limitation to fundamental rights will only exist where there's interference with fundamental rights and such interference is prohibited by an existing law and punishment by the State should follow (Berlin, 1958).

In the event of murder, the interference is violating someone's fundamental right to life and the existing law prohibiting such interference is 'Thou shall not murder'. Where these two conditions are met, then limitation can be said to be in line with the principle of legality and imprisonment may follow as punishment. Where any of these two conditions cannot be determined, limitation to fundamental right cannot exist and the person is free to go on with their lives without any constraints i.e., no punishment may be imposed by the State, as no crime has been committed (Starck, 2009).

The Draft Declaration of the International Rights and Duties of Man provides; article 25: "Everything that is not prohibited by law is permitted;" article 26: "No one shall be convicted of crime except by judgment of a court of law, in conformity with the law . . . Nor shall anyone be convicted of crime unless he has violated some law in effect at the time of the act.

Legal certainty in employment law prevents employers from taking arbitrary or unjustified actions that may infringe upon workers' right to work (Gribnau, 2013). Clear legal standards and procedural requirements govern employment decisions ensuring that these decisions are made in accordance with established legal principles and without any injustice.

Legal certainty in labour law enables workers to assert their rights and hold employers accountable for unlawful conduct. This is paramount in protecting the right to work of workers who are always at a disadvantage when it comes to disputes with employers. Principle of legality plays a crucial role in upholding the right to work by providing clear legal standards, enforcing labour rights, and protecting individuals from arbitrary actions by employers (Garibaldi, 1976).

5.3 Protection of the right to work.

The right to work is protected by the common law as well as constitutions that follow the principles of constitutionalism (Maloka, 2015). Common law refers to the body of legal principles and precedents established through judicial decisions (Stoner, 2007).

5.3.1 Common law

The common law has long protected the right to work through its concern with restraints of trade and granting of monopolies by the crown (Lord, 1945). The common law disliked limiting individuals' ability to work (Newsom, 2000). One of the distinctive differences between alienable and inalienable lies with the surrendering of the right to society (Stern *et al.*, 1975). While the former can be surrendered, the latter cannot. The inability to surrender the right, means the inability for others to control that right (Muioz, 2016). Thus, for the purpose of this research it is assumed a person is at liberty to work and that liberty can only be abridged in terms of another clear right.

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Common law provides that when there's interference with someone's rights or freedom, it must be done in a just manner (Bingham, 2010). This means that the rule of law, principle of legality and where there's procedural aspects or circumstances then principles of administrative law must be adhered to. If unfairness is visible in the exercising of power by government or private bodies in interfering with someone's fundamental rights, such exercise of power should be subjected to a review by an independent judiciary (Press & Journal, 1975).

Common law doctrines such as contract law, employment law, and labor law often provide protections to the right to work ensuring that individuals have the freedom to enter into voluntary employment agreements and that employers fulfill their contractual obligations to provide work opportunities (Kanamugire, 2015). Common law doctrines such as wrongful dismissal, unjust enrichment, and equitable remedies may provide avenues for individuals to seek redress if their right to work is unlawfully infringed upon by employers or other parties. Courts may rely on established common law principles and precedents to adjudicate disputes related to employment rights and ensure that individuals are afforded due process and fair treatment in the workplace and that the right to work is protected (Cortese, 2023).

5.3.2 Constitutionalism

Democratic constitutions adhere to common law principle of constitutionalism (Dicey, 1939). Constitutionalism refers to the adherence to principles of constitutional governance, including the supremacy of the constitution, the rule of law, separation of powers, and the protection of fundamental rights and liberties (Mill, 1859).

Constitutionalism, for the want of any better description, can be described as the constitutional structure which secures the individual's inalienable rights (Adagbabiri, 2015). So, a constitution which achieves the goals of protecting these rights can be said to comply with the principles of constitutionalism. The converse is equally correct, constitution which violates the principles of constitutionalism can be said to be in breach of the fundamental principle of constitutionalism. For example, if a "constitution" permitted the murder of blue-eyed babies it will be said that that "constitution" does not adhere to the principles of constitutionalism (Stephen, 1882).

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Thus, according to Stephen if a sovereign parliament passed a law murdering all blue-eyed babies that would be a valid law, falling within the purview of the sovereign parliament. Dicey, the most famous constitutional jurist and cousin to Stephen concurred with that view (Dicey, 1915).

Both Stephen and Dicey argued that no parliament would make such a law and if they did no society would obey that law even if valid. There is no solution to Stephen's conundrum if it is accepted that parliament is the sovereign law-making institution. The American experiment was to adopt a constitution which limits the sovereignty of parliament (Rogers *et al.*, 2013). It is often said the constitution is the supreme law of the land. It is better to say in a constitutional democracy parliament is no longer the sovereign law-making institution.

So, Stephen's conundrum is resolved in a constitutional dispensation where the constitution conforms to the principles of constitutionalism (Stephen, 1882). Life is a fundamental inalienable right and thus a law which purports to murder blue-eyed babies would be unconstitutional and thus not a valid law in terms of the principle of constitutionalism. The introduction of constitutionalism does indeed resolve Stephen's conundrum. But what would the position, if an article was inserted into the constitution stating that blue-eyed babies can indeed be murdered? Those who echo the view that the constitution is sovereign would then concede blue-eyed babies can be constitutionally murdered. But if it is realized that constitutions need to conform to the principles of constitutionalism and a constitution which includes an article allowing the murder of blue-eyed babies violates the principle of constitutionalism and is thus not a valid constitution.

Government should be limited in ways that protect individuals from unwarranted state power. The term constitutionalism means that the power of leaders and government bodies is limited, and that these limits can be enforced through established procedures (Congress, 1868). Constitutionalism is a concept in political theory that explains that a government does not derive its power from itself but gain its power as the result of there being a set of laws that give the governing body certain powers. This concept is in sharp opposition to monarchies, theocracies, and dictatorships, in which the power does not derive from a pre-drawn legal document.

In a monarchy, the power is derived as an inalienable right of the king or queen. In a theocracy, all the power of a governing party is derived from a set of religious beliefs, which are thought to exist as a result of the well of God, and in a dictatorship, the power is derived from the will of a single or group of people and their ideology, which does not necessarily represent the will of the people (Muioz, 2016).

Constitutionalism therefore naturally prescribes a system of government in which the government's powers are limited.

The principle of constitutionalism limits government and individual actions, and activities according to constitutional restraint (Porter, 2015). It states that nobody, no matter how highly placed, is above the law and that the law is no respecter of anybody. This principle of constitutionalism empowers the judiciary to declare any action that conflicts with the constitutional provision as null and void, and ultra vires. It also grants individuals the chance to challenge any action of the government viewed as unconstitutional in the law court.

Constitutionalism means adherence to the spirit of the constitution. A constitution may be defined as the whole body of fundamental laws, customs, conventions, principles, rules and regulations according to which a particular government of a country or an organization operates (Dicey, 1915). The constitution therefore specifies the working of a government or organization, the functions of its officials, the rights and duties of its citizens. These relate to limiting powers of the ruler. This limitation can happen through a codified Constitution or uncodified Constitution. The Codified Constitution is a set of written laws that governs three arms of government; the executive, the legislature and the judiciary. All these three arms have limited powers and exist independently of one another under the constitution. The U.S government has a codified constitution which came about through Declaration of Independence (*Declaration of Independence*, 1776). Uncodified constitution is not written set of laws. It depends heavily on legislative precedence and parliamentary proceedings (Adagbabiri, 2015).

Constitutions to meet the requirement of constitutionalism must protect inalienable rights; right to property, liberty and pursuit of happiness. The existence of these rights precedes that of the constitution. In protecting inalienable rights under the constitution, all three arms of government have roles to play as well as limitations to adhere to, in protecting inalienable rights. The legislative arm of government cannot pass laws that alienate unalienable rights of citizens (Muioz, 2016).

The judiciary cannot alienate objects of unalienable rights without following due process of the law. In adhering to these limitations, all three arms work independently of one another but performs check and balance (Brand *et al.*, 2019). The legislature may set out laws that private citizens must adhere to in order not interfere with rights of other citizens. The judiciary may use these laws as set of guidelines in determining whether certain rights have been interfered with (Gusman and Syofyan, 2023).

Constitutionalism recognizes limitations of objects of inalienable rights of citizens. These limitations are set-out in the Bill of Rights (Linde, 1980). Any person who interferes with other person's right to life, liberty and pursuit of happiness may have objects of their inalienable rights limited. These limitations may only happen through independent judiciary by means of due process of the law.

A person who kills another may through courts be ordered to be killed as well. This person is ordered to lose their life as an object of their inalienable right to life. This murderer still enjoys his inalienable right to life and may not be killed by any other means except through what the court has ordered. A police warden who had a conflict, strangles, and kills a murderer who is awaiting his day to be hanged may not plead the murderer's death sentence in order to get acquitted. The murderer awaiting his day to be hanged still enjoys his inalienable right to life and the warden will be subjected to court proceedings for interfering with someone's right to life (Eoyang, 1999).

The right to personal liberty as understood in England means in substance a person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification (Maitland, 1897). That anybody should suffer physical restraint is in England prima facie illegal, and can be justified on two grounds only, that is to say, either because the prisoner or person suffering restraint is accused of some offence and must be brought before the Courts to stand his trial, or because he has been duly convicted of some offence and must suffer punishment for it.

Now personal freedom in this sense of the term is secured in England by the strict maintenance of the principle that no man can be arrested or imprisoned except in due course of law (Maitland, 1897). Any limitation on unalienable right to property, liberty and pursuit of happiness may only be done through independent judiciary by following due process of the law.

Working is to also freely enter into exchange transactions. The most important exchange transaction is the exchange labor for money. From the money earned individuals are able to provide and support themselves. It can thus be said every person has the liberty to work. Clearly the ability to abridge right to work has to be very constrained because work is fundamental. It is in this context that debarment must be considered (Siti Marwiyah, 2019).

5.3.2.1 The South African Constitution

Many modern constitutions explicitly recognize and protect the right to work as a fundamental human right(Woubeshet and Adagbabiri, 2015). These constitutional provisions may guarantee the right to work, the right to just and favorable conditions of work, the right to equal opportunities in employment. The SA Constitution is examined to demonstrate if it does indeed adhere to the principle of constitutionalism with respect to the right to work. It is also established that any limitation on inalienable right to property, liberty and pursuit of happiness may only be done through independent judiciary by following due process of the law (Glendon, 2001) and it is justifiable (Muioz, 2016).

5.3.2.2 Section 36

South Africa is a democratic country, and its constitution adheres to the principle of constitutionalism with respect to freedom to work (Brand *et al.*, 2019). Fundamental rights can be limited in terms of s36 of the SA Constitution. It is also established that any limitation on protected rights may only be done through independent judiciary by following due process of the law (Glendon, 2001) and it is justifiable (Muioz, 2016).

Constitutions limits government power in order to protect liberty of the people over tyranny. South African constitution separates political power into three distinct branches, to each of which it gives the means to check and balance the other two (Parliament of the Republic of South Africa, 1996).

5.3.2.3 Equality before the law

Government when governing its citizens must adhere to the principle of equality (Crawford, 2015). All people must be equal before the eyes of the law and must be treated equal before the law irrespective of the status they hold within the society.

This principle is also protected by our very own Constitution under section 9.

> 9. (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.
>
> (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.

5.3.2.4 Limitation in the exercise of functions

The activities of those who govern should not be absolute. Government when exercising its power is subject to limitation. One obvious limitation is the Constitution, any governmental function that violates the Constitution is invalid and may be nullified in the court of law. Section 2 of chapter 1 of the Constitution provides for the supremacy of Constitution,

> 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled' (Parliament of the Republic of South Africa, 1996).

How government regulate its citizen is also a subject of the Constitution, in regulating its citizens parliament ought to abide to the principles outlined in the Constitution.

The right to work is protected by the Constitution. Section 22 of the Constitution on freedom of trade, occupation and profession provides that every citizen has the right to choose their trade, occupation or profession freely (Parliament of the Republic of South Africa, 1996).

This freedom to work as provided for in s22 falls within the Bill of Rights. In terms of s7 of the Constitution the rights in the Bill of Rights are subject to limitation. Section 36 provides that 'The rights in the Bill of Rights can be limited if this is reasonable and justifiable in an open and democratic society that is based on human dignity, equality and freedom (Brand *et al.*, 2019).'

These are the factors that a person or court must take into account if a right is to be limited:

- The nature of the right
- The importance of the purpose of limiting the right
- How much the right will be limited
- The relation between the limitation and its purpose
- Whether there are better ways to achieve the same purpose

6 Statutory debarment

6.1 Part A: prelude FAIS

6.1.1 Introduction

This part analyzes some forms of limitation to the right to work before FAIS Act debarment. These limitations are closely related to the FAIS Act debarment in terms practice, in that individuals were prohibited from working in one way or the other.

The first one is the Monopolies Act which was passed to prevent the King from granting monopolies. The monopolies prevented others from competing in area covered by the monopolies (Baker, 1889). During the early modern period in England, monarchs had the authority to grant monopolies, which conferred exclusive rights to individuals or companies to produce or sell certain goods or services. These monopolies stifled competition, limited consumer choice, and often led to higher prices and reduced quality for consumers (Hirst, 2008).

There are also restrictive practices which achieves the same objective as the Monopolies Act but extends beyond business operation to includes restricting individuals from offering their services (Withington, 2007). Restraint of trade is the earliest most common limitation where people are restricted from conducting business in certain areas (Kanamugire, 2015). The third and more recent development is the formation of professional societies or bodies; people who wish to practice their profession need to belong to a professional body or society. They may also have their membership terminated. The consequence of this is that they lose designated titles that come with being a member of such bodies and cannot practice in certain roles that requires them to hold those tittles (Bilchitz, 2011).

Lastly, the right to work may be terminated by way of a specific piece of legislation. The last section of this part concludes by analyzing how all these forms of limitation differs from FAIS Act debarment.

6.1.2 Monopolies Act 1600s

Trading is essential for the survival of human. Trading has been a fundamental aspect of human civilization since ancient times and remains essential for the survival, development, and prosperity of societies around the world. Working is trading one's skill or labor. Where people are restricted from trading, they are also being restricted from making a living (Siebert, 1986).

History shows that trading has been so paramount to human survival that even parliament would even reverse some of the decisions by the Crown in the United Kingdom. Monopolies Act was passed by British parliament as a response to the Crown granting monopolies to certain individuals and restricting others from trading (Letwin, 1954).

In the early 1600s there was a development of the patent system leading to Statute of Monopolies (Baker, 1889). This system granted monopolies of trade to certain individuals and thereby restricting other individuals from trading. These monopolies were granted to four categories of patents. The first category relates to bringing into England of technologies that were already in use in Europe and relates to patents for invention (Walker-Smith and Gombos, 1963). Patents for the manufacture of Sulphur, oil, sailcloth, glass, and mills for grinding corn.

The second category includes the non obstante grants. These allowed the recipients to operate particular industries or business notwithstanding the existence of a statute that banned the activity. The third category of patents, include patents that permitted the regulation of specific trades and trade routes. The patents to ensure that other Acts were complied with. These patents can be seen to contribute to three things: the increase in the level of employment in England; the improvement of the balance of trade between England and its trading partners; and the delegation of governance.

The monopolies Act was there to stop the Crown from granting monopolies (Baker, 1889). Although the Statute of Monopolies of 1623 confirmed that monopolies were contrary to common law, this research interest is showing the importance of the right to trade and the extent that governments can go to protect the right of its citizen. Monopolies can result in market failure and governments have a duty to intervene and prevent market failure, but in this case, government intervened to protect individual's right to trade which was being limited through granting of monopolies by the Crown (Letwin, 1954).

The practice of granting monopolies was widely criticized by merchants, traders, and lawmakers, who viewed it as detrimental to economic growth and innovation. They argued that monopolies undermined free trade, hindered entrepreneurship, and concentrated wealth and power in the hands of a privileged few (Letwin, 1954). In response to growing opposition to monopolies, the English Parliament passed the Monopolies Act in 1623 during the reign of King James I. The Act aimed to curb the crown's ability to grant monopolies by prohibiting the issuance of monopolistic patents except in certain limited circumstances.

The Monopolies Act of 1623 declared that all monopolies and monopolistic patents granted by the crown after a specified date were null and void. It exempted certain types of monopolies deemed to be in the public interest, such as patents for new inventions or discoveries, but prohibited the granting of monopolies for goods or services already in existence. The principles underlying the Monopolies Act of 1623 continue to inform contemporary competition law and policy in many jurisdictions around the world.

Today, laws and regulatory agencies are in place to prevent anticompetitive practices, promote market competition, safeguard consumer interests, and rights of workers (Hirst, 2008). Recognizing the importance of individual rights to trade and the detrimental effects of monopolies on commerce and society, Parliament passed the Monopolies Act to curb the crown's ability to grant monopolies. The Act declared that all monopolies and monopolistic patents granted by the crown after a specified date were null and void, except in certain limited circumstances deemed to be in the public interest. Parliament recognized the importance of individual's right to trade; parliament then prohibited the monopoly by passing the law against monopolies. This can be seen as government intervention against limitation to the right to trade.

6.1.3 Restrictive trade practices

Trading, both of goods or individual's skills can also be constrained through restrictive practice (Parry, 1958). This happens were people who are already in business collude to exclude others from entering the market. Restrictive trade practices refer to agreements, arrangements, or behaviors adopted by firms or organizations to restrict competition, distort markets, or hinder the entry or expansion of rivals.

Common examples of restrictive trade practices include price fixing, market allocation, exclusive dealing, tying and budling, resale price maintenance, predatory pricing, collusive bidding(Connor, 2001). Price fixing occurs when competitors agree to set prices at a certain level, either directly or indirectly, rather than allowing prices to be determined by market forces. This practice reduces competition and can lead to higher prices for consumers (Kaplow, 2001).

Market allocation involves agreements between competitors to divide markets or customers among themselves, thereby limiting competition in specific geographic areas or market segments. This practice can result in reduced choice and higher prices for consumers (Piggott, 1975). Exclusive dealing occurs when a seller requires a buyer to purchase its products exclusively or refrain from dealing with competitors. This practice can foreclose competitors from accessing distribution channels and limit consumer choice (Nurski and Verboven, 2012).

Tying and bundling involve selling products or services together as a package, with the condition that buyers must purchase all items in the bundle or tie-in arrangement. This practice can be anticompetitive if it forecloses rivals from selling their products or services separately (Elhauge, 2009). Resale price maintenance occurs when a manufacturer or supplier dictates the prices at which its products are sold by retailers or distributors. This practice restricts price competition and can lead to higher retail prices (Comanor, 2010).

Predatory pricing involves setting prices below cost with the intention of driving competitors out of the market or deterring potential entrants. While predatory pricing may initially benefit consumers with lower prices, it can ultimately harm competition and lead to monopolistic behavior (Crane, 2005). Collusive bidding occurs when competitors agree to coordinate their bids in public procurement processes or auctions to manipulate prices or allocate contracts unfairly. This practice undermines the integrity of procurement processes and can result in higher costs for taxpayers (Chotibhongs and Arditi, 2012).

Business owners may collude to charge higher prices to consumers. Although no person has a right to a lower price, collusion is contrary to common law and should be controlled to avoid market failure. If business owners are able to collude and set prices for the market, they are also at the liberty of deciding who should participate in the market. This monopolistic behavior excludes certain individuals from participating in the market thereby limiting their freedom to trade (Telser, 1965).

Restrictive practices have a tendency to create a monopolistic market and limit individuals' freedom to trade. Restrictive practices are against common law and courts are very clear on this as well. An ancient case, *Mitchel v Reynolds (1711),* Lord Smith LC explained that it is the privilege of a trader in a free country, in all matters not contrary to law, to regulate his own mode of carrying it on according to his own discretion and choice.

Restrictive trade practices hinder competition, limit market access, or create barriers to entry for businesses and individuals indirectly affecting the right to work. Restrictive trade practices such as monopolies, exclusive dealing, or market allocation can limit competition in certain industries or sectors. As a result, fewer businesses may operate in the market, leading to reduced demand for labor and fewer employment opportunities for workers. This can particularly affect small businesses, startups, and entrepreneurs who may face barriers to entry due to anticompetitive practices (Telser, 1965). Restrictive trade practices have significant implications for the right to work by limiting competition, constraining entrepreneurship.

6.1.4 Restraint of trade

Restraint of trade refers to agreements or practices that restrict individuals' freedom to engage in gainful employment, pursue their profession, or compete in the open market (Kanamugire, 2015). If a man had a business and wished to sell it, with its good will, he could get a better price if he might lawfully bind himself not to interfere with that business which he was selling by engaging in the same business within the same territory (Richard, Campbell and Elles, 1996).

A seller who puts a term that restricts him from competing with the buyer in the same business would likely get a better deal in selling his business than a seller who chooses to retain his freedom to compete with the buyer. This would also be in the interest of the buyer as he would wish to secure his bargain. This practice defines what restraint of trade is. The agreement would affect only the buyer and the seller and does not affect the general public. If these restrictive practices go beyond the scope of the business that is sold, either in the matter of territory or in the character of the business, the restrictive practice will cease to serve its proper and legitimate purpose (Richard, Campbell and Elles, 1996).

Such restrictive practice would be unreasonable and unenforceable (Newsom, 2000). Theres also a restriction of a retiring partner not to compete with the firm which he had just left. Partners in a partnership may also restrict each other from doing anything to interfere by competition or otherwise with the business of the firm. A person who sells his property to another and that other agreed not to use the property in competition with the business retained by the seller. These restrictive practices were reasonable as measured by the lawful purpose of the principal contract to which they were subsidiary.

Although these restrictive practices seemed to be reasonable, fear of monopoly was one of the reasons why such restrictive practices were not enforceable at common law. The courts been very clear on the views of restrictive practices, Chief-Justice Parker in 1711, in the leading case of *Mitchel v Reynolds,* I.P. Williams, 181, 190, where he sated the objections to a contract as follows:

“First, the mischief which may arise from them: (1) to the party by the loss of his livelihood and the subsistence of his family; (2) to the public, by depriving it of a useful member. Another reason is the great abuses these voluntary restraints are liable to; as, for instance, from corporations who are perpetually laboring for exclusive advantages in trade and to reduce it into as few hands as possible"

Restraint of trade agreements, such as non-compete clauses in employment contracts, can limit individuals' ability to seek employment opportunities in specific industries or with competing firms. These agreements may prohibit employees from working for competitors or starting their own businesses in the same field, thereby reducing their options for employment (Kanamugire, 2015).

A contractual undertaking not to trade is void and unenforceable unless the restraint of trade is reasonable to protect the interest of parties. A restraint of trade is simply an agreement that is designed to restrain another's trade (Newsom, 2000). In an employment setting, it will be some kind of provision that is designed to limit an employee to work.

To be a valid restraint of trade in the first place, both parties must have provided valuable consideration for their agreement to be enforceable. Under English law, restraint of employment is enforceable if, there is a legitimate interest which needs to be protected and if the restraint is reasonable, i.e., sufficiently protects the interest and goes no further (Letwin, 1954).

6.1.5 Professional bodies and societies

Regulating professions helps eliminate bad behavior from practitioners. One of the most common way of regulating professions is developing professional bodies where practitioners are monitored. These professional bodies exist by means of subscription; only subscribed members may be monitored (Maloka, 2015).

These professional bodies are so common that certain professions only exist through the recognition of a professional body. An example would be the disbarment of an attorney. Disbarment of attorneys has rich history in English law. In the 15th century, parliament of England enacted a statute relating to disbarment of attorneys (Richard, Campbell and Elles, 1996);

> "For sundry damages and mischiefs that have ensued before this time to divers persons of the realm by a great number of attorneys, ignorant and not learned in the law, as they were wont to be before this time, it is ordained and established, that the attorney shall be examined by the justices, and by their discretions their names put in the roll, and they that be good and virtuous, and of good fame, shall be received and sworn well and truly to serve in their offices, and especially that they make no suit in a foreign country; and the other attorneys shall be put out by the discretion of the said justices; and their masters, for whom they were attorneys, be warned to take others in their places so that in the meantime no damage nor prejudice come to their said masters. And if any of the said attorneys do die, or do cease, the justices for the time being by their discretion shall make another in his place, which is a virtuous man and learned, and sworn in the same manner as aforesaid; and if any such attorney be hereafter notoriously found in any default of the record, or otherwise, he shall forswear the court, and never after be received to make any suit in any court of the king"

In South Africa, you may not practice as an attorney unless you are recognized as an attorney by the Law Society of South Africa (Siebert, 1986). Subscription to this professional body is open to every lawyer that qualifies to be an attorney however, the very same profession may withdraw practice license of an attorney in a more fashion way "striking-off role". A lawyer who has been "strike-off roll" may not practice as an attorney in South Africa. Of all the practices mentioned above, this is the most similar to FAIS Act debarment.

However, in terms Law Society of South Africa practice guidelines, disbarment of an attorney may only be warranted through the court of law. This means that an alleged lawyer may only be disbarred after being found guilty of a criminal offense by a court of law. The consequence of this disbarment is that such lawyer may no longer practice as an attorney but may continue to work using a different designated title such as legal consultant etc. These are two distinct differences between FAIS Act debarment and disbarment from professional bodies (Swisher, 2013).

In FAIS Act debarment, employees may be debarred without involving the courts let alone being found guilty of any offence, employees are also prohibited from holding any position within the financial industry.

6.1.6 Other examples of statutory limitation

Statutory debarment is a form of punishment (Williams-Elegbe, 2020). Punishment is imposed to act as a deterrent to protect society. Statutory debarment punishes an individual by prohibiting them from continuing to work in the financial industry. There's very little development of literature when it comes to common law debarment as either a punishment or deterrent (Vivian, 2020).

A court of law can impose a fine, imprisonment, which may indirectly prevent someone from working. Professional bodies such as councils of professions may withdraw practice license of certain members, this also may indirectly prevent someone from working. There is no sufficient literature to support general debarment where one is precluded from working as in the case of FAIS Act debarment (Bellamy, 2013).

A more recent development has been the introduction of debarment largely associated with the fight against corruption in public offices(Auriol and Søreide, 2017). Section 28 of the Prevention of Corruption Act provides for South Africa's list of court-debarred contractors, "Register for Tender Defaulters". A person may be debarred in terms of the Corruption Act if found guilty of active and passive bribery in public contracts in terms of s12 and/or if found guilty of bribery in relation to the tendering process in terms of s23 (*Prevention of Corruption Act*, 2004). Courts and organs of the state may implement debarment where a contractor is in breach of the following Acts and their subordinate regulations of parliament (Williams-Elegbe, 2020);

- The Prevention of Corruption Act 2004,
- The Preferential Procurement Policy Framework Act Regulations 2017,
- The Public Finance Management Act Regulations 2005,
- The Municipality Finance Management Act Supply Chain Management Regulations 2005.

The general principle which emerges is that this type of debarment comes from, breaking the law, a court hearing and organs of the state enforcing punishment, and punishment being debarred from conducting business with any organ of the state for a limited period (a period not exceeding 10 years) (Stevenson *et al.*, 2011).

6.1.7 Conclusion

These forms of limitation do not extend to exclusion of people from working or doing business almost everywhere. Courts have been very clear on the extent of application of earlier forms of limitations. The limitation ought to be reasonable for it to be enforceable. The most obvious difference between these forms of limitations and FAIS Act debarment is that someone who is debarred in terms of FAIS Act loses the right to work not only for the firm that has debarred him but anywhere within the financial industry.

6.2 Part B: Background to statutory debarment

Before FAIS, no legislation explicitly regulated how representatives should conduct themselves or what principles representatives should uphold (Vivian, 2020). The responsibility of maintaining discipline or professionalism within the industry fell upon the representatives themselves and their respective FSPs. When a representative was accused of misconduct, it was the FSP's responsibility to discipline such a representative in line with the employment contract. Employment contracts are governed by labor laws as well as law of contracts. This makes it difficult for the employer to abuse its power when dealing with an employee.

No industry wide practice existed to deal with professional practice or disciplinary measures. The very same thing can be said about registration of representatives, there was no prescribed way representatives were registered by FSPs (Hogan, 2001). Each FSP could employ a representative based on its own requirements and guidelines. The only binding agreement between FSPs and their representatives would be the employment contract. The terms of each contract would be different depending on the FSP.

Registration of representatives and meeting the 'fit and proper' requirements featured prominently in the FAIS Bill debates (Comments of the Life Underwriters' Association of South Africa on the Draft Financial

Advisors' Bill, 1999). It was alleged that registration of representatives comes with some sort of professionalism, this concept was adopted from the UK after the Registration of Broker's Act of 1977 (Davie, 2000). In the UK, the belief was that those who belong to a professional body or regulated industry were earning better wages than individuals in the 'informal' or unregulated industry(Benfield, 2001). Industry practitioners or insurance brokers would then slide towards registration of brokers. The 'fit and proper requirements' was said to be addressing the issue of mis-selling which happens when customers are being sold products to their detriment. These were the two main arguments in favor of the FAIS Act. Firstly, the FAIS Act was said to bring about professionalism in the financial services industry and secondly, it could address the issue of mis-selling.

Parliamentary Finance Portfolio Committee held a meeting on the 25 September 2001, this meeting was attended by the Financial Service Board (FSB) as well as members of the National Assembly and it was chaired by Ms Barbara Hogan (Hogan, 2001). In the meeting, Mr Wessels who was head of legal services at the FSB at the time, gave background of the FAIS Bill (Hogan B, 2001). Mr Wessels started off by pointing out the gap that existed in regulating intermediaries. There was no regulatory framework when it comes to intermediaries that existed before FAIS. Mr Wessels also emphasized that the Bill will protect the consumers from fraud.

Leading to the introduction of FAIS, as per discussion above, it was alleged the life industry had an unacceptable lapse rate of life policies (Malherbe and Morojele, 2001). It was argued by the regulator that this was caused by the mis-selling of life office products. During a debate on the FAIS Bill before parliament, it was argued that the FAIS Act was merely to protect consumers against being sold financial products that are ill-suited to their needs. FAIS was introduced, the lapse rate did not decline but increased unabated since the introduction of FAIS as indicated in the figure below (FSCA, 2017).

The Socio-Economic Impact Study on FAIS is an important document when it comes to understanding some of the facts around the introduction of the FAIS Act and its debarment provision. The Socio-Economic Impact Study was released in September 2001, and it included the cost benefit analysis of FAIS. The report was prepared by Stephan Malherbe of Genesis Analytics and Morabo Morojele, an Independent Consultant, on the instruction on the Financial Service Board (Malherbe & Morojele, 2001).

The report gives details of socio-economic projections of FAIS Act. This research proposal gives a brief detail of how FAIS was forecasted in the cost benefit analysis (CBA) of the FAIS Bill. This CBA was aimed at forecasting the potential costs and benefits of the Bill which was meant to govern conduct of about 22,850 professionals within the insurance and the banking sector (Malherbe & Morojele, 2001).

Source of benefit	Amount (Rm)	Note
In LT insurance		
Reduction in LT policy lapses	275	Assume 50% success rate wrt remediable lapses only.
2% savings in LT commissions	121	From reduced misselling & improved disclosure.
Improved return in one year of .5%	559	From reduced misselling & improved disclosure.
In ST insurance		
1% reduction in ST insurance premiums	200	From increased competition & disclosure.
Total	**1,155**	

Table 1. Estimated benefits to consumers from reduced miss-selling and over-selling (Malherbe & Morojele, 2001)

The report projected that because of FAIS Act the lapse rate would decline producing a saving of R1,155 bn. One of the non-quantifiable benefits includes professionalism of the industry by introducing the ‘fit and proper’ requirements. This new law, ‘professionalizing the industry’ comes with penalty to those who do not seem to be upholding it. The penalty is *debarment.* A representative who fails to uphold industry professional standards by not meeting fit and proper requirements may face debarment as a result. The need for professionalizing the industry as well as imposing penalty to those who do not seem to uphold professional standards seems to be a ticket in which debarment found its way into the Act (Malherbe & Morojele, 2001). These projections were made before the FAIS Act was enacted into law.

Lapse rate

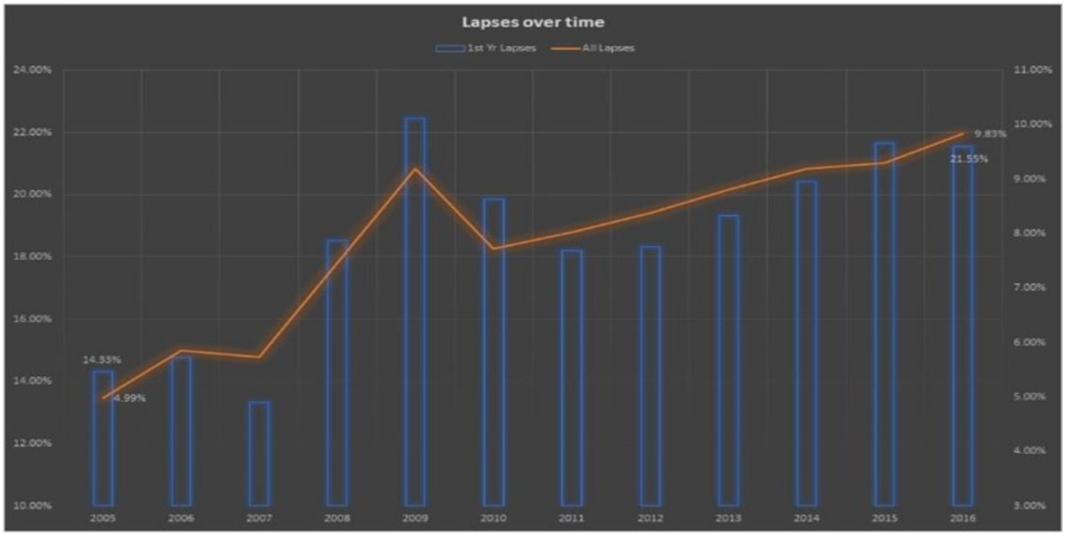

Table 2. **illustrating** ***Lapse rate over time*** (FSCA, 2017)

The FAIS Act was passed into law in 2002, three years later in 2005 the lapse rate can be seen to be escalating in the graph above. This lapse rate can be seen to have increased from 4.99% in 2005 to 21.55% in 2016 (FSCA, 2017), this is contrary to the predictions of the CBA which projected a 50% reduction in lapse rate (Malherbe & Morojele, 2001). The lapse rate as the justification for FAIS Act was then quietly forgotten as FAIS Act acquired a new life of its own.

6.3 Fundamental challenges with FAIS' debarment

How is section 14 of FAIS Act problematic? Firstly, debarment is a limitation to freedom to work (Mill, 1859). Freedom to work is an inalienable right in terms of common law (Mill, 1859). Common law protects freedom to work. Common law provides principles which ought to be followed when limiting freedom to work. Principles such as natural justice, which provides for fair hearing for the offender, principle of legality, which provides that a crime ought to have been committed for a State to impose punishment i.e., limitation to right to liberty (Bennett & Bennett, 2011).

Debarment deprives affected parties of their freedom to work. Section 14 of the FAIS Act does not outline any due process which must be followed when debarring a practitioner. Section 14 read together with section 13(2) and section 8(1) provides that a practitioner may be debarred for failure to meet fit and proper requirements which may include among other things, personal character qualities of honesty and integrity. It is difficult to find any form of conduct which may be considered criminal when interpreting these three sections together. Fundamental rights such as freedom to work engage the principle of legality (Garibaldi, 1976). It is against principle of legality to impose punishment where no crime has been committed (Garibaldi, 1976).

6.4 Debarment under FAIS Act.

The FAIS Act provides debarment to those who fail to meet fit and proper requirements. Fit and proper requirements vary from obtaining relevant qualifications to being honest to both the employer and clients. In practice, fit and proper requirements can be translated to, for example, keeping safe record of client's details and transaction (SCA, 2015). This means that a person who fails to keep clients' records may also have failed to meet fit and proper requirements and will face debarment in terms of FAIS Act. However, failing to keep clients' records does not fall within limited circumstances in which fundamental rights can be limited.

As of 2023 there are two sets of debarments within the financial service markets, firstly is the debarment initiated by the FSPs, in terms of s14 of FAIS Act. Secondly, is the debarment by the FSCA governed by s153 of the FSR Act. The later used to be s14A of the FAIS Act until this section was replaced with s153 of the FSR Act effective 1st April 2018 (Nortier & Mogale, 2021). Both these sets of debarments follow the same chronology. This research focuses more on the s14' FAIS Act debarment, as it introduced statutory debarment within the financial service market.

6.4.1 Section 14

Section 14. (1) provides that: An authorised financial services provider must ensure that any representative of the provider who no longer complies with the requirements referred to in section 13(2)(a). is prohibited by such provider from rendering any new financial service by withdrawing any authority to act on behalf of the provider, and that the representative's name, and the names of the key individuals of the representative, are removed from the register referred to in section 13(3): Provided that any such provider must immediately take steps to ensure that the debarment does not prejudice the interests of clients of the representative, and that any unconcluded business of the representative is properly concluded.

(2) For the purposes of the imposition of a prohibition contemplated in subsection (l),

(a) information regarding the conduct of the representative as provided by the

(b) any contravention of, or failure to comply with, any relevant provision of this

(3) The authorised financial services provider must within a period of 30 days after the removal of the names of a representative and key individual from the register as contemplated in subsection (1), inform the registrar in writing thereof.

Qualifications of representatives and duties of authorised financial services providers.

13. (2) provides that: An authorised financial services provider must-

(a) at all times be satisfied that the provider's representatives, and key individuals of such representatives, are, when rendering a financial service on behalf of the provider, competent to act, taking into consideration requirements similar to those contemplated in paragraphs *(a)* and *(b)* of section 8(1) and subsection (1)(b)(ii) of this section, where applicable: and

(b) take such steps as may be reasonable in the circumstances to ensure that representatives comply with any applicable code of conduct as well as with other applicable laws on conduct of business.

Section 8(1) provides that: 'An application for an authorisation referred to in section 7(1). including an application by an applicant not domiciled in the Republic, must be submitted to the registrar in the form and manner determined by the registrar by notice in the *Gazette,* and be accompanied by information to satisfy the registrar that the applicant complies with the requirements for fit and proper financial services providers or categories of providers, determined by the registrar by notice in the *Gazette,* after consultation with the Advisory Committee, in respect of-

(a) personal character qualities of honesty and integrity.

(b) the competence and operational ability of the applicant to fulfil the responsibilities imposed by this Act; and

(c) the applicant's financial soundness:

Codes of Conduct

Clause 14(f)(ii)(e) provides that: The code of conduct must comply with the principle that 'appropriate records of information disclosed, together with verification of actual disclosures and acceptance by clients involved, must be maintained for the period determined by the registrar'…the burden on the financial adviser should rather be reduced by requiring a financial advisor to keep only those records which are likely to be material in relation to a complaint and by specifying the time period for which they are to be kept.

6.4.2 Board Notices

Central to this regulatory framework are a series of board notices issued under the Financial Advisory and Intermediary Services (FAIS) Act, which delineate the requirements and conditions that authorized financial services providers (FSPs), key individuals, and representatives must adhere to (Financial Services Board, 2013).

Among these board notices, Board Notice 106 of 2008 holds particular significance as it outlines the Fit and Proper requirements for individuals involved in providing financial services. Together with other complementary notices such as Board Notices 103, 104, and 105 of 2008, Board Notice 106 establishes a comprehensive set of standards governing the conduct, qualifications, and ongoing professional development of participants in the financial services industry.

In this context, it becomes imperative to examine the contents and implications of Board Notice 106 of 2008, along with its counterparts, to gain a deeper understanding of the regulatory environment in which financial services providers operate. This introduction sets the stage for a detailed exploration of the key provisions and implications of Board Notice 106 and its related notices, shedding light on their role in upholding the integrity and reliability of the financial services sector in South Africa.

Board Notice 106 of 2008, issued under the Financial Advisory and Intermediary Services (FAIS) Act, holds significant importance in regulating the conduct and qualifications of individuals operating within the financial services industry in South Africa. This notice, titled "Determination of Fit and Proper Requirements for Financial Services Providers, 2008," outlines the specific criteria and standards that authorized financial services providers (FSPs), key individuals, and representatives must meet to ensure their competence, integrity, and suitability for their roles.

Key provisions of Board Notice 106 include requirements related to qualifications, experience, and ongoing professional development. It sets forth the standards for individuals engaged in providing financial advice or intermediary services, aiming to enhance consumer protection, promote market integrity, and maintain public confidence in the financial services sector.

Board Notice 106 of 2008, titled "Determination of Fit and Proper Requirements for Financial Services Providers, 2008," establishes the criteria and standards for assessing the competence, integrity, and suitability of individuals operating within the financial services industry in South Africa.

The notice specifies the educational qualifications required for individuals working in various roles within the financial services sector. This may include degrees, diplomas, or certifications from recognized institutions relevant to the specific area of financial services.

In addition to educational qualifications, Board Notice 106 may outline the professional certifications or licenses necessary for individuals to practice within certain sectors or perform specific functions, such as providing investment advice or selling insurance products.

The notice typically sets out minimum requirements for practical experience or on-the-job training in the financial services industry. This may include a specified duration of relevant work experience or the completion of apprenticeships or internships under qualified practitioners.

Individuals subject to the fit and proper requirements must demonstrate honesty, integrity, and ethical conduct in their dealings with clients, colleagues, and regulatory authorities. This includes maintaining high standards of professionalism and transparency in all financial transactions and communications.

The notice assesses the competence and skills of individuals to perform their duties effectively and efficiently within the financial services sector. This may include evaluating their knowledge of relevant laws, regulations, products, and market practices, as well as their ability to provide sound financial advice and recommendations.

The notice establishes obligations for financial services providers and individuals to comply with the fit and proper requirements and outlines the regulatory mechanisms for enforcement. This may include conducting audits, inspections, or investigations to ensure compliance and imposing sanctions for non-compliance, such as fines, suspension, or debarment.

7 Proposed framework underpinning the limitation of the right to work derived from the common law and encapsulated within the South African Constitution

7.1 Introduction

This chapter drives a framework for an acceptable debarment process which accords with the common-law and the SA constitution. This framework is guided by previous chapters on rights and the limitation of these rights. As per the introduction, this framework can be used as a guideline to any debarment process.

The framework proposed in this chapter for an acceptable debarment process aligns with both common law principles and the Constitution of South Africa. Drawing upon the analysis of rights and their limitations discussed in previous chapters, this framework provides a structured approach that can serve as a guideline for any debarment process within the financial industry or beyond.

The above chapters set out outline on the right to work, i.e., the existence of the right to work, its limitation as well as the process that ought to be followed when limiting the right to work, and its protection in a democratic state. All these three things are mutually inclusive, a right ought to exist first before the existence of the process of limiting it. This section focuses on limitation of the right to work. It uses literature from previous chapters to develop a framework of limiting the right to work. Such framework is informed by common law and the South African constitution.

The framework emphasizes the importance of respecting common law principles, such as the rule of law, due process, and the principle of legality. Debarment processes should be conducted in accordance with established legal norms, ensuring fairness, transparency, and procedural justice. The framework ensures that any debarment process complies with the provisions of the South African Constitution. This includes safeguarding the rights of individuals, such as the right to work and the right to administrative justice, as enshrined in the Constitution. Debarment decisions must be lawful, reasonable, and procedurally fair, in line with constitutional principles.

7.2 Limitation of right in terms of common law

7.2.1 Introduction

No right per say is absolute (Garibaldi, 1976). It has been long accepted that the exercise of a right does not extend to the injury of the rights of others. Right may be limited if the exercise of those rights cause injury to others. If the intention of debarment is to prevent injury to others, it may fall within the parameters of limitation of rights in terms of common law. For debarment to fall within the parameters of common law's limitation of rights, it must be in line with the principles of common law.

There are two clear principles which have evolved in the common law; the first is the principle of legality and the other is due process must be followed. In terms of common law, rights may be limited if the conduct of a person interferes with rights of others. First, there is a law which must be breached and then due process must be followed. The famous law, “Thou shalt not kill” illustrates the process. No individual’s right extends to the “right” to murder others. To commit murder is to violate the law which prohibits murder. Thus, rights are not absolute. No person has a right to murder another person. Where murder has been committed, the perpetrator of the crime will be held accountable following due process. The process of limitation of rights in terms of common law is captured by the phrase rule of law. Rule of law includes the principle of legality and due process (Sheuerman, 2009).

The first principle is that of legality. Principle of legality provides that the charge that an accused person should be presented with an allegation that a clear existing law has been breached the breach of which is sufficient to sustain punishment (Garibaldi, 1976). In short, a breach of an existing law should have been committed. The principle of legality centres around the nature of the offence and whether or not a real breach of the law can be proven.

This section examines the rule of law; due process and the principle of legality when it comes to limitation to the right to work through FAIS Act debarment. In conclusion, this section provides a clear path that should be followed in terms of due process as well as a clear definition of the crime which ought to be committed to sustain debarment.

7.2.2 Principle of legality

The Common law provides that before any process can be launched against a person round must exist to believe that that person must violate an existing prohibition, preferably a law (Garibaldi, 1976). That law limits the right of a person to commit prohibited conduct. The prohibited conduct warrants the limitation. The section of common law that focuses on prohibition is the principle of legality

(Manchester, 1977). Before debarment is imposed, there should be a prohibition which is breached by the person subject to debarment. The prohibition should be sufficient to sustain debarment.

The principle of legality is part of the doctrine of the Rule of Law – but separate from the administrative justice clause itself. The principle generally expressed the idea that 'the exercise of public power is only legitimate where lawful (Hoexter, 2004). The principle of legality has long been recognized as a fundamental aspect of the common law legal system inherited from British colonial rule. Under this tradition, governmental powers are limited by law, and public authorities are required to act within the bounds of their legal authority. This principle formed the basis for safeguarding individual rights and liberties against arbitrary state action. During the colonial era, South Africa's legal system was shaped by the imposition of British legal principles and institutions (Gribnau, 2013).

The rule of law and principles of legality were established as foundational elements of the colonial legal order, providing a framework for governance and administration. The principle of legality gained renewed significance with the transition to democracy and the adoption of a new democratic constitution in 1996. The Constitution of the Republic of South Africa, 1996, became the supreme law of the land and enshrined the principles of the rule of law, legality, and constitutional supremacy.

The South African Constitution explicitly protects the principle of legality through various provisions. Section 1 of the Constitution establishes the supremacy of the Constitution and requires all branches of government to uphold its principles. Section 2 affirms the rule of law as one of the foundational values of the democratic state. Additionally, Section 33 guarantees the right to just administrative action, which includes the right to lawful, reasonable, and procedurally fair administrative action.

Fundamental rights engage the principle of legality (Garibaldi, 1976). The principle of legality requires that before limitation to fundamental right is imposed, an existing law protecting fundamental rights ought to have been broken first, to an extent that such limitation will not exist if there's no law protecting fundamental right. Breaking the law only is not sufficient, there ought to be a crime committed for limitation to fundamental right to be imposed. Crime may be defined as 'conduct which common or statute law prohibits and expressly or impliedly subjects to a punishment which is remissible by the State alone and which the offender cannot lawfully avoid by his own act once he has been convicted'. Punishment must be prescribed by law.

When a person is debarred, they are no longer free to supply their labor. No person has unconstrained liberty, liberty may be limited. Where liberty is not limited or limitation does not exist, each person is free to go on with their business without any constraints. Right to liberty, liberty to work is a fundamental right. The principle of legality deals with these constraints or limitations to fundamental rights (Hoexter, 2004).

These fundamental rights are protected. As long as these fundamental rights exist, their protection also exists as well. 'Thou shall not kill' this phrase commands every person not to kill and the effect of not killing is that every person will then be protected from murder and can go on with their lives freely without the fear of being killed. This protection exists in order to allow everyone to enjoy their right without any limitation. The effect of this protection places a negative duty on everyone, that is you are required to refrain from doing something (Starck, 2009). In the case that a person violates the rules protecting fundamental rights, perhaps through murder which will be in violation of the rule 'Thou shall not kill', such person may have their fundamental rights limited.

The principle of legality provides that limitation to fundamental rights will only exist where there's interference with fundamental rights and such interference is prohibited by an existing law and punishment by the State should follow (Garibaldi, 1976). In the event of murder, the interference is violating someone's fundamental right to life and the existing law prohibiting such interference is 'Thou shall not murder'.

Where these two conditions are met, then limitation can be said to be in line with the principle of legality and imprisonment may follow as punishment. Where any of these two conditions cannot be determined, limitation to fundamental right cannot exist and the person is free to go on with their lives without any constraints i.e., no punishment may be imposed by the State, as no crime has been committed.

The Draft Declaration of the International Rights and Duties of Man provides; article 25: "Everything that is not prohibited by law is permitted;" article 26: "No one shall be convicted of crime except by judgment of a court of law, in conformity with the law . . . Nor shall anyone be convicted of crime unless he has violated some law in effect at the time of the act.

Where a crime is committed, a punitive measure by the State ought to follow. Such punitive measure may bring about effect to limitation to fundamental rights. Fundamental rights engage the principle of legality. What is crime? According to Burchell & Hunt, crime may be defined as 'conduct which common or statute law prohibits and expressly or impliedly subjects to a punishment which is remissible by the State alone and which the offender cannot lawfully avoid by his own act once he has been convicted'(Burchell, 1983).

Conduct is punishable only if the law says it is punishable(Burchell, 1983). In legal terms, this principle is often encapsulated in the Latin maxim "*nullum crimen sine lege*," which translates to "no crime without a law." This principle signifies that an act can only be considered criminal and subject to punishment if it is expressly prohibited by law. Individuals can only be held accountable for their actions if those actions contravene specific laws or statutes enacted by the appropriate legislative authority. Without a clear legal prohibition, conduct cannot be deemed punishable, and individuals cannot be penalized for it.

7.2.2.1 Conduct prohibited by common or statute law, punishable and unavoidable.

The point of departure in analyzing Section 14 of the FAIS Act is to identify whether there is any specific act or conduct referenced within the legislation that triggers the debarment process. Section 14 pertains to the debarment of individuals within the financial services industry, and it arises as a consequence of certain conditions not being met (Auriol and Søreide, 2015).

One such condition is outlined in Section 13(2) of the FAIS Act, which addresses the competence of representatives or key individuals within financial service providers (FSPs). If an FSP fails to satisfy the requirements regarding the competence of its representatives or key individuals, as stipulated in Section 13(2), this can lead to debarment.

Furthermore, Section 8(1) of the FAIS Act is relevant as it pertains to compliance with fit and proper requirements. Compliance with these requirements is essential for individuals acting within the financial services industry. Failure to meet these fit and proper requirements can also be a factor leading to debarment under Section 14.

Therefore, the analysis involves examining whether the conduct or actions of representatives or key individuals within FSPs align with the standards set forth in Sections 13(2) and 8(1) of the FAIS Act. If it is found that these requirements are not met, debarment may be initiated as a consequence.

In essence, the starting point is to assess whether there is a clear nexus between the conduct or actions specified in the FAIS Act and the grounds for debarment outlined therein. This analysis helps to determine the parameters within which debarment proceedings can be initiated and ensures that any resulting actions are grounded in statutory provisions and regulatory requirements.

Section 8(1) An application for an authorisation referred to in section 7(1) including an application by an applicant not domiciled in the Republic, must be submitted to the registrar in the form and manner determined by the registrar by notice in the *Gazette,* and be accompanied by information to satisfy the registrar that the applicant complies with the requirements for fit and proper financial services providers or categories of providers, determined by the registrar by notice in the *Gazette,* after consultation with the Advisory Committee, in respect of-

(a) personal character qualities of honesty and integrity;

(b) the competence and operational ability of the applicant to fulfil the responsibilities imposed by this Act; and

(c) the applicant's financial soundness:

The Act itself does not prohibit any form of conduct, but only explicitly deals with outcomes or consequences of, i.e., personal character qualities of honesty and integrity, a certain conduct. Theft may lead to one's failure to possess personal character qualities of honesty and integrity. The very same way, failure to keep record of certain transactions may also lead to one's failure to possess personal character qualities of honesty and integrity. Theft is a crime as per section 243 of the Criminal Procedure Act 51 of 1977. On the other hand, there's no law that criminalizes failure to record a transaction. Based solely on this, there's lack of clarity in FAIS Act on conduct that may lead to one's failure to posses' personal character qualities of honesty and integrity.

It will therefore help, to look into some of the decided cases on the issue of debarment, to establish if conduct which was decided upon is indeed what would be considered a crime i.e., prohibited by common or statute law. One of the tested cases is *Financial Service Board v Barthram* (202007/2014) [2015] ZASCA 96 (1 June 2015). It is not important to discuss all facts of the case and court's decision at this stage, it is also not important to discuss whether there was a duty on Mr Barthram to act i.e., to make sure that every document is completed before signing.

However, what is important for this section is determining whether conduct which Discovery Ltd based its decision to debar Mr Barthram is indeed prohibited and hence criminalized. This will then give us a light on the type of conduct which the FAIS Act omitted to clarify. Mr Barthram was debarred after his employer at the time, Discovery Ltd, found that he signed some documents which were incomplete. According to Discovery Ltd, this constituted irregularity and consequently led to Mr Barthram failure to meet fit and proper requirements in the eyes of Discovery Ltd. The conduct in this case is signing incomplete documents. There is no statute that prohibits signing of incomplete documents, the very same way there is no common law rule that prohibits such acts. It is fair to say, the decision to debar Mr Barthram and hence limit his fundamental right, was brought upon by a conduct which is not prohibited by statute or common law.

Although it is not clear on FAIS Act, what type of conduct may affect personal character qualities of honesty and integrity, Barthram case proves that some conducts may include such conduct which is not criminal in nature.

The principle of legality requires that before limitation to a fundamental right is imposed, an existing law protecting fundamental rights ought to have been broken first, to an extent that such limitation will not exist if there's no law protecting fundamental right (Hoexter, 2004). There ought to be a crime committed. There are no obvious actions of representative and key individual that can be linked to interfering with other people's fundamental rights hence no prohibition of conduct, let alone any negative duty placed on them by law to refrain from certain acts in relation to their profession. Section 14(1) does not conform with limitation of fundamental rights and the principle of legality to an extent that it is based on the satisfaction of the employer and not an existing law protecting fundamental rights (Du Toit, 2004).

Where a person's enjoyment of right or freedom conflicts with other people's fundamental rights the government ought to act to protect fundamental rights (Starck, 2009). The actions of government may include having to limit the rights of an individual whose enjoyment or freedom conflicts fundamental rights of others. In limiting a person's rights, the principle of legality is applied.

The principle of legality provides that any limitation to fundamental rights of individuals through court judgement or administrative act must be in line with the law that governs people's rights to an extent that such limitation would not be valid if it does not exist in law (Hoexter 2004). These laws must be very clear laws and not retrospective laws. The most common example where limitation would exist in law is where the exercise of one's right is in interference with other's enjoyment of their rights. Where there's the existence of interference with other people's rights, the principle of legality provides that fundamental rights may be limited through legal sources i.e., statutes, customs and judgement, or morality and the rights of others. These sources are applied on the grounds of public order and general welfare of society.

In conclusion, the analysis presented in this section sheds light on the complexities surrounding the debarment process within the financial services industry, particularly in South Africa. Through an examination of cases such as *Financial Service Board v Barthram* (202007/2014) [2015] ZASCA 96 (1 June 2015), it becomes evident that the criteria for debarment, as outlined in Section 14 of the FAIS Act, may lack clarity regarding the types of conduct that warrant such severe consequences.

The principle of legality serves as a guiding framework, emphasizing the importance of basing limitations on fundamental rights on existing laws that explicitly protect those rights. However, the satisfaction of the employer alone, as stipulated in Section 14, may not align with this principle, raising concerns about the fairness and legality of the debarment process (Adeabah *et al.*, 2022).

Furthermore, the absence of specific statutes or common law rules prohibiting certain conduct, such as signing incomplete documents, raises questions about the justification for debarment in such cases. Without clear legal grounds for imposing limitations on fundamental rights, the legitimacy of debarment decisions may be called into question.

Overall, the principle of legality underscores the need for transparency, legal justification, and adherence to existing laws in the debarment process (Hoexter, 2004). Moving forward, it is essential to establish a clearer framework that aligns with legal principles and safeguards the rights of individuals within the financial services industry. Only through such measures can the integrity and fairness of the debarment process be upheld, ensuring that limitations on fundamental rights are justified and in the best interests of society as a whole.

7.2.3 Due process

The principle of due process is a fundamental aspect of justice that ensures fair treatment and procedural fairness in legal proceedings or administrative actions (Chidede and Osode, 2019). It is a concept deeply rooted in the idea that individuals should be afforded certain rights and protections before their right to work can be taken away. When a person is debarred their right to work is limited. The process of debarment should follow the due process of law.

In the context of the debarment process within the financial services industry in South Africa, the principle of due process is fundamental to ensuring fairness and justice. Due process refers to the procedural safeguards that must be followed before an individual's rights or privileges are restricted or revoked. It encompasses principles such as notice, opportunity to be heard, right to legal representation, and impartial decision-making (Chidede and Osode, 2019).

To uphold the principles of due process, it is essential to establish transparent and accountable procedures for debarment, including clear criteria for determining when debarment is appropriate, mechanisms for providing notice and opportunity to respond, and avenues for appeal or review (Hahlo and Maisels, 1966). Additionally, ensuring the independence and impartiality of decision-makers involved in the debarment process is crucial for upholding the principles of due process.

By incorporating robust due process protections into the debarment process, stakeholders can enhance the fairness, integrity, and legitimacy of the regulatory framework governing the financial services industry. This, in turn, promotes confidence among consumers, industry participants, and the public, ultimately contributing to the stability and trustworthiness of the financial sector.

First and foremost, the debarring party, typically a Financial Service Provider (FSP), must have a valid case against the representative they seek to debar. This necessitates a thorough examination of the grounds for debarment and the presentation of evidence supporting such action. Importantly, the representative must be provided with adequate notice of the intention to debar them, along with the specific grounds for the proposed debarment. This notice serves as a fundamental aspect of the principle of audi alteram partem, or the right to be heard (Kelly, 1964).

Upon receiving notice of the intended debarment, the representative must be afforded a reasonable opportunity to respond. This includes the right to present their case, both orally and through written submissions, before an impartial decision-maker (Hlongwane, 2020). A fair hearing ensures that all relevant information and arguments are considered before any decision is made. Moreover, it guards against the risk of bias, ensuring that the decision-maker remains objective and impartial throughout the process.

Despite the existence of guidelines and procedural requirements, complaints have arisen regarding instances where representatives were not provided with adequate notice or opportunity to respond. Such deviations from procedural fairness undermine the integrity of the debarment process and risk infringing upon the rights of the individuals involved. It is imperative that measures are implemented to ensure strict adherence to procedural requirements, thereby safeguarding the rights of all parties involved (Financial Services Board, 2013).

There are situations where being given prior notice of action and opportunity to be heard would not apply. These situations are not an exception to the rule of audi alteram partem, but rather the rule will not apply simply because nothing unfair can be inferred by not affording an opportunity to present a case (Ashwini, 2023). Situations where applying the due process is impractical may be excluded from the rule of audi alteram partem (Kelly, 1964).

However, as mentioned above, there are complaints by representatives for not being informed of the intent to debar or being given an opportunity to present their case. Surely unfairness can be inferred in this situation and such situations are subject to the rule of audi alteram partem (Kelly and Partem, 1964).

In conclusion, the debarment process within the South African financial services industry must adhere rigorously to the principle of due process to ensure fairness, transparency, and procedural integrity. The principle of due process requires that individuals facing debarment are afforded certain rights and protections, including notice of the allegations against them, an opportunity to respond, the right to legal representation, and impartial decision-making.

By incorporating these fundamental principles into the debarment process, stakeholders can uphold the rights of individuals while promoting confidence in the regulatory framework governing the financial services sector. This not only ensures that decisions are made fairly and transparently but also contributes to the stability and trustworthiness of the industry as a whole (Stevenson *et al.*, 2011).

It is imperative that any deviations from procedural fairness are addressed promptly to prevent infringements upon individuals' rights and to maintain the integrity of the debarment process. Upholding due process not only protects the rights of those involved but also fosters a regulatory environment that is accountable, transparent, and conducive to the long-term success of the financial services industry (L. Baxter, 1979).

In essence, the principle of due process serves as a cornerstone of justice, ensuring that the rights of individuals are respected and upheld throughout the debarment process. By adhering to these principles, stakeholders can ensure that decisions are made fairly, transparently, and in the best interests of all parties involved.

7.3 Limitation in terms of the South African Constitution

The right to work is deeply intertwined with the concept of liberty, which is a fundamental aspect of inalienable rights, natural rights and human rights (Rautenbach, 2001). Liberty, encompassing the freedom to make choices and pursue one's interests, is inherent in all three groups of rights analyzed (Siegan, 2003). At its core, liberty grants individuals the autonomy to engage in productive activities, pursue livelihoods, and contribute to society in meaningful ways. The right to work not only provides individuals with economic independence and security but also fosters personal dignity and self-fulfillment.

This section focuses on a constitutional basis in terms of which the right to work can be limited. The right to work reflects the liberty of individuals to engage in productive labor and pursue employment opportunities. Democratic constitutions throughout the world protect inalienable rights (Dicey, 1939).

South Africa is a democratic country and also a member country to the United Nations. It is generally accepted that South African Constitution adheres to the principle of constitutionalism and as such protects fundamental rights. South African is also committed to the international rules and charters of the United Nations as a member country. Human rights are found in the UDHR which is a charter of the United Nations and binds all member states.

In limiting right to work, the South African constitution ought to promote the spirit and principles of constitutionalism which are included as part of fundamental rights. The right to work is protected under the Bill of Rights in the Constitution. All rights protected in the Bill of Rights may be limited in terms of s36 limitation. The below section deals with how the right to work may be limited using s36 limitation clause.

7.3.1 Bill of Rights

The right to work holds a significant place within the framework of fundamental rights, often intersecting with the principles outlined in various bills of rights around the world. In many jurisdictions, including South Africa, the right to work is enshrined as a fundamental right within the broader context of constitutional protections (Rautenbach, 2001).

In the South African context, the right to work finds expression in the Bill of Rights, specifically in Section 22 and 23 of the Constitution. These sections guarantee every citizen the right to choose their trade, occupation or profession freely, right to fair labor practices, including the right to freely choose their employment, to just and favorable conditions of work, and to fair remuneration. It also prohibits unfair discrimination in the workplace and affirms the rights of workers to form and join trade unions.

By anchoring the right to work within the Bill of Rights, South Africa underscores its commitment to upholding the dignity and well-being of its citizens through meaningful employment opportunities and fair labor practices. This constitutional protection serves as a cornerstone for promoting social justice, economic empowerment, and the realization of individual potential (Brand *et al.*, 2019).

Moreover, the right to work is not only about securing employment but also about creating an enabling environment where individuals can pursue their vocations, contribute to society, and enjoy the fruits of their labor. It encompasses aspects of economic freedom, social justice, and human dignity, reflecting the interconnectedness of rights within a democratic society (Rautenbach, 2001).

However, it's essential to recognize that the right to work is not absolute and may be subject to limitations under certain circumstances, such as the protection of public order, health, or morals (Rautenbach, 2001). Furthermore, the effective realization of this right requires not only legal protections but also the implementation of policies and programs aimed at promoting employment, eliminating discrimination, and fostering inclusive economic growth. Below section deals with the limitation of the right to work in terms of the South African constitution.

7.3.2 Section 36 limitation.

The examination of Section 36 of the South African Constitution provides crucial insights into the process of limiting rights, particularly concerning the right to work within the context of FAIS Act debarment. Section 36 serves as a guiding framework for understanding the permissible limitations on rights and the principles that must be followed in imposing such limitations.

Firstly, Section 36 does not directly limit any specific right but rather establishes the parameters and procedures for the limitation of rights. It sets out factors to consider when determining whether a limitation is justifiable in a democratic society based on human dignity, equality, and freedom. These factors include the nature of the right, the importance of the purpose of the limitation, and whether less restrictive means are available to achieve the purpose.

In the context of the right to work, any limitation, such as debarment under the FAIS Act, must adhere to the principles outlined in Section 36. This means that the limitation must serve a legitimate purpose, such as protecting consumers or maintaining the integrity of the financial services industry. Additionally, the limitation should be proportional to the importance of the purpose and should not be overly restrictive.

Furthermore, Section 36 requires that any limitation on rights be subject to review by the courts to ensure compliance with constitutional principles. This ensures accountability and safeguards against arbitrary or unjust limitations on fundamental rights, including the right to work.

7.3.2.1 The law of general application

One crucial aspect of the limitation on the right to work is the requirement that any restriction must be imposed by a law of general application (Garibaldi, 1976). This principle ensures that limitations on the right to work are established through transparent and democratically enacted legislation, rather than arbitrary or ad hoc measures. In the context of the financial services industry in South Africa, the right to work may be limited through statutory provisions such as those found in the Financial Advisory and Intermediary Services (FAIS) Act. However, for such limitations to be valid, they must comply with the requirement that they are enacted through a law of general application.

7.3.2.2 The nature of the right

Right to work is a multifaceted right that encompasses not only the freedom to engage in gainful employment but also the broader notion of economic participation and self-sufficiency.

At its core, the right to work affirms individuals' ability to pursue livelihoods, support themselves and their families, and contribute meaningfully to society. It is intimately tied to the concept of human dignity, as the ability to work and earn a living is essential for fulfilling one's basic needs and aspirations (Slade, 2017).

Moreover, the right to work is closely linked to other fundamental rights, such as the right to equality and non-discrimination. Access to employment opportunities should be available to all individuals on an equal basis, without regard to factors such as race, gender, religion, or disability (Tikhonyuk and Yarosh, 2022).

Additionally, the right to work extends beyond mere economic considerations and encompasses broader notions of social justice and empowerment. It is a means through which individuals can exercise agency, realize their potential, and participate actively in the social, economic, and political life of their communities (Rogers *et al.*, 2013).

Furthermore, the right to work is not solely an individual entitlement but also carries collective dimensions. It encompasses the right of workers to organize, bargain collectively, and advocate for improved working conditions and fair wages. It also entails obligations on the part of governments and employers to create conducive environments for productive and dignified work (Kaminiski *et al.*, 2009).

Overall, the nature of the right to work is deeply rooted in principles of human dignity, equality, and social justice. It is a fundamental right that underpins individual autonomy, economic independence, and societal well-being, and it requires robust legal protections and mechanisms to ensure its realization for all members of society.

Section 36 applies to all the rights in the Bill of Rights, right to work is part of the Bill of Rights under s22 on freedom to trade.

7.3.2.3 The importance of the purpose of limiting the right

The importance of limiting the right to work lies in balancing individual freedoms with broader societal interests and goals. While the right to work is fundamental, there are instances where limitations may be necessary to achieve legitimate objectives, such as public safety, order, health, or the protection of the rights and freedoms of others (Bilchitz, 2011).

Limitations on the right to work may be necessary to protect the rights and freedoms of others. For instance, restrictions on certain professions or occupations may be imposed to prevent exploitation, discrimination, or harm to vulnerable individuals or groups. Limiting the right to work may be justified when it serves the public interest or promotes the common good. For example, regulations that require certain qualifications or certifications for specific professions ensure public safety and consumer protection. Limiting the right to work may be warranted to prevent harm to individuals (Bilchitz, 2011).

7.3.2.4 How much the right will be limited.

The extent to which the right to work can be limited depends on various factors, including the specific circumstances, the objectives being pursued, and the legal framework in place. While the right to work may be subject to limitations in certain circumstances, such limitations should be carefully justified, narrowly tailored, and applied in a manner consistent with principles of fairness, equality, and the rule of law. The goal is to promote a balance between individual freedoms and collective interests while upholding the dignity and rights of all members of society (Bilchitz, 2011).

While Section 36 allows for the limitation of rights under certain circumstances, it also imposes strict requirements to ensure that such limitations are reasonable and justifiable in a democratic society. Right to work is part of liberty which is protected by both common law and democratic constitutions. This right is subject to more stringent limitations (Maloka, 2015).

For example, a representative who is debarred is prohibited or banned from continuing to render financial services in South Africa (Chidede and Osode, 2019). A representative who is debarred is 'strike-off' from practicing within the financial services market. In similar practice, striking-off, in legal profession is considered to be the legal profession's version of capital punishment (Maloka, 2015).

A lawyer is required to meet 'fit and proper requirement' and failure to do so may lead to 'striking-off' from practicing. However, in as much as the consequence of failure to meet fit and proper requirements may be the same for both financial services industry and the legal profession, these requirements are not the same (Vassen, 1998). This debarment being 'capital punishment' illustrate the death of representative's right to work within the financial services market. His right to work within the financial services market is limited to an absolute extent. The only possible situation where 'capital punishment' may be imposed to limit representative's right to work is when a crime has been committed and a judgement was handed by a judge of court of law (Rautenbach, 2001). Such situation may lead to limitation to right to work.

7.3.2.5 The relationship between the limitation and its purpose

The relationship between the limitation of the right to work and its purpose is crucial in determining the legitimacy and validity of the restriction (Bilchitz, 2011). The purpose of limiting the right to work must be clearly defined and justified. It should serve a legitimate aim recognized by law, such as protecting public safety, ensuring consumer welfare, or maintaining the integrity of professional standards. The limitation must be necessary to achieve this purpose and should be based on compelling reasons supported by evidence.

The restriction should be tailored to address specific risks, harms, or concerns related to the profession or industry in question (Garibaldi, 1976). Any arbitrary or overly broad limitations that are not directly linked to the stated purpose may be deemed unjustified. The relationship between the limitation and its purpose often involves a balancing test between competing interests and rights. It requires weighing the importance of the societal goal being pursued against the impact on individual rights and freedoms. The limitation should strike a fair balance that respects both the collective welfare and the dignity and autonomy of individuals.

For example, the limitation in terms of the FAIS Act or debarment is prohibiting representatives from practicing, thereby prohibiting them from working as representatives within the financial services industry. The purpose of this limitation is described on the report from parliamentary committee meeting on the FAIS Bill, as being to professionalize the industry and protection of policyholders' interests (Hogan B, 2001). Justified limitation in terms of s36 of the Constitution is that which is imposed as a consequence of a conduct which interferes with other people's fundamental rights and the purpose of such limitation would be protection of rights of others and the well-being of all.

7.3.2.6 Conclusion

In conclusion, the examination of Section 36 of the South African Constitution provides valuable insights into the process of limiting rights, particularly regarding the right to work within the context of FAIS Act debarment. Section 36 establishes the framework for justifiable limitations on rights, emphasizing the importance of procedural fairness, proportionality, and adherence to democratic principles.

The right to work, as affirmed by the Constitution, is integral to individual autonomy, economic independence, and societal well-being. However, it is subject to limitations when necessary to achieve legitimate objectives, such as protecting public interests, ensuring consumer welfare, or maintaining professional standards (Rautenbach, 2001).

The limitation of the right to work must adhere to the principles outlined in Section 36, including the requirement that limitations are imposed by laws of general application and are justified by compelling reasons. The purpose of the limitation should be clearly defined and directly related to the intended societal goal, and the restriction should be proportionate to the importance of that purpose.

Furthermore, any limitation on the right to work must afford individuals adequate procedural protections, such as notice, opportunity to be heard, and judicial review, to ensure fairness and accountability in the decision-making process.

While limitations on the right to work, such as debarment under the FAIS Act, may be necessary in certain circumstances, they should be carefully justified, narrowly tailored, and subject to rigorous scrutiny to safeguard individual rights and uphold the principles of democracy and justice.

Ultimately, by adhering to the principles outlined in Section 36 and respecting the inherent dignity and autonomy of individuals, South Africa can achieve a balanced regulatory framework that promotes both economic prosperity and fundamental rights.

7.4 Example of accepted limitation using s14 debarment

The right to work is a fundamental aspect of individual liberty protected by both common law principles and democratic constitutions. This research has elucidated how the right to work can be limited in accordance with established legal frameworks, focusing particularly on the application of Section 14 (debarment) within the context of the FAIS Act.

The framework outlined in this research provides a robust structure for evaluating the validity of debarment actions under common law and democratic constitutional principles. Debarment actions will conform with this framework when they adhere to the rule of law's due process and legality, both in principle and practice.

Specifically, debarment actions will be deemed valid when they involve a clear definition of the alleged criminal conduct, afford the accused individual the opportunity to defend themselves before an impartial adjudicator, and ensure that any punishment imposed is proportionate to the alleged offense.

When these criteria are met, debarment actions serve the interests of justice and uphold the integrity of the legal system.

However, debarment actions will not conform with the established framework when they fail to provide adequate due process or legality protections. Instances where due process is not followed, or where debarment is imposed arbitrarily or disproportionately, undermine the principles of fairness and justice enshrined in the legal system.

7.5 Conclusion

By examining the limitations of the right to work in terms of the South African Constitution, the analysis highlights the importance of adhering to Section 36 limitation principles. It emphasizes the need for clear processes, alignment with constitutional values, and proportionality in limiting individuals' rights. The examination of Section 36 underscores the requirement for debarment processes to be justified by compelling societal interests, such as the protection of consumers' interests.

Furthermore, the exploration of common law principles underscores the significance of due process and legality in the debarment process. The discussion on due process emphasizes the necessity of fair procedures, including notice, opportunity to respond, and impartial adjudication. Similarly, the principle of legality underscores the requirement for debarment to be based on conduct that constitutes a crime or violation of existing laws.

In applying these principles to the FAIS Act debarment process, it becomes evident that adherence to due process and legality is essential for the validity of debarment decisions. Debarment decisions must be based on clear evidence of misconduct or failure to meet regulatory requirements, and the process must afford individuals the opportunity to defend themselves and challenge allegations.

Ultimately, debarment decisions that align with the framework outlined in this analysis will contribute to the integrity of the financial services industry, protect consumers' interests, and uphold fundamental rights in a democratic society. However, any deviations from these principles risk undermining the legitimacy and fairness of debarment actions, highlighting the importance of strict adherence to procedural fairness and legal standards in the debarment process.

8 Appraisal of statutory debarment introduced in terms of FAIS

8.1 Appraisal of FAIS

The Financial Advisory and Intermediaries Act 37 of 2002 (FAIS) introduced a pivotal concept known as "debarment," which is distinguished as a general statutory debarment within this analysis. This form of debarment diverges from traditional professional debarments, which are typically specific to professions such as attorneys, engineers, and doctors, where individuals are barred from practicing their profession due to failure to meet specific standards of education, experience, and professional conduct.

FAIS, a statutory mechanism, employs debarment in a broader context, essentially "cancelling" individuals from being employed in any capacity within the financial services sector, rather than merely barring them from a particular profession. This form of debarment has significant implications, not only for the individuals affected but also for the employing entities, which face severe consequences for non-compliance.

The introduction of the debarment system under FAIS raises profound questions about its necessity, effectiveness, and compatibility with the principles of a constitutional democracy. In a system purportedly underpinned by a world-class constitution and robust institutions designed to protect fundamental rights, the existence and implementation of such a debarment scheme appear contradictory and problematic. This section critically appraises the FAIS debarment system, examining its legal basis, procedural fairness, and the extent to which it aligns with or contravenes constitutional safeguards. The conclusion reached is that the current system of statutory debarment under FAIS should be reconsidered or reformed, as its existence highlights potential inadequacies in the protection of fundamental rights within the South African constitutional framework.

FAIS, a comprehensive piece of legislation, lacks a clear purpose or catalyst for its enactment. It possibly follows UK regulatory developments, such as the Insurance Brokers (Registration) Act 1977 and the pensions mis-selling scandal of the 1990s. FAIS aims to regulate financial advisory and intermediary services, focusing on intermediaries and advisory services. The debarment provision initially in Section 14 has evolved but remains contentious.

8.1.1 Original Section 14 of FAIS

The original Section 14 mandated that financial services providers (FSPs) ensure representatives who no longer meet certain requirements are prohibited from rendering new financial services and have their names removed from the register. S14 did not specify what the requirements were but referred to s13(2)(a). This in turn referred so s8 and the best one could do is say the representative had to have characteristics of honesty and integrity. This is an unacceptable convoluted system. The original s14 did not require any process to be followed. FAIS therefore lacked clear due process, raising concerns about its legality and fairness.

8.1.2 Current Section 14 of FAIS

The revised Section 14 introduces procedural safeguards but still mandates FSPs to debar individuals based on their fit and proper status or material non-compliance with FAIS provisions. Central to this is the representative may have characteristics of honesty and integrity. This includes ensuring the debarment process is lawful, reasonable, and procedurally fair, with opportunities for affected individuals to respond.

8.1.3 Brief analysis of FAIS Debarment under Common Law and Constitutional

8.1.3.1 Common Law Requirements

Principle of Legality

The principle of legality demands clear criteria for debarment. The offensive conduct must be specified. The original Section 14 failed this test, lacking specific criteria. The current Section 14 attempts to address this but remains vague, using terms like "fit and proper" which in turn refers to honesty and integrity without detailed definitions (Stevenson *et al.*, 2011). These do not clearly indicate what a person must do to be debarred. Such ambiguity fails to meet the standard set by Lord Hoffman's principle that fundamental rights cannot be overridden by vague terms.

Due Process

The current s14 requires the process to be fair. The decision to debar is made by the employer, not a court of law, which is problematic. The debarment process in FAIS equates to cancellation, an unprecedented and problematic concept. Involving the employer/FSP in the debarment process compromises the independence required for a fair adjudication, making the process inherently biased.

8.1.3.2 Constitutional requirements

Debarment and the Bill of Rights

The right to work is protected under Section 22 of the South African Constitution, which ensures every citizen's freedom to choose their trade, occupation, or profession. The debarment process under FAIS infringes upon this right, necessitating a stringent constitutional review. It is accepted that the right to work is included in the Bill of Rights which means it can only be abridged in terms of s36.

Limitation under Section 36 of the Constitution

Section 36 reads as follows:

> 36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society

based on human dignity, equality and freedom, taking into account all relevant factors, including –

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may

limit any right entrenched in the Bill of Rights.

Section 36 allows for the limitation of rights only under reasonable and justifiable circumstances within an open and democratic society. Debarment is very extreme, it denies the debarred person the right to earn a living and places the dependents of that person at risk.

FAIS debarment, with its vague criteria and flawed process, likely fails this test. The necessity and proportionality of such a broad debarment scheme are questionable, suggesting it exceeds permissible limits on fundamental rights.

The current system of statutory debarment under FAIS presents significant challenges in terms of legality, procedural fairness, and constitutional alignment. The broad and vague criteria, coupled with the involvement of potentially biased employers in the debarment process, undermine the protection of fundamental rights guaranteed by the South African Constitution. Therefore, reconsideration or reform of the FAIS debarment system is essential to ensure it aligns with constitutional safeguards and adequately protects the rights of individuals within the financial services sector.

8.2 FAIS Act debarment and the acceptable framework

8.2.1 Section 14

8.2.1.1 Introduction

The FAIS Act imposes fit and proper requirements on financial services providers and their representatives. These requirements include qualifications, competence, honesty, integrity, and financial soundness. Providers must ensure that their representatives meet these requirements at all times. Section 14 of the FAIS Act outlines the process for debarment of representatives who no longer comply with the fit and proper requirements.

Authorized financial services providers have a duty to prohibit such representatives from rendering any new financial services and to remove their names from the register. Financial services providers have the responsibility to ensure that their representatives are competent to act and comply with applicable codes of conduct and other relevant laws. This includes taking reasonable steps to ensure compliance and maintaining appropriate records of information disclosed to clients.

8.2.2 Comment in terms of the acceptable framework

8.2.2.1 Common law

The principle of legality emphasizes that limitations on fundamental rights, such as the right to work, must be based on clear legal prohibitions (Garibaldi, 1976). Section 14 of the FAIS Act outlines fit and proper requirements which need to be adhered to but does not explicitly link them to specific legal prohibitions. It would be beneficial to provide more clarity on the legal provisions that constitute breaches of the fit and proper requirements and warrant debarment.

The principle of legality also encompasses the requirement of due process and procedural fairness in administrative actions (Hoexter, 2004). While the FAIS Act outlines the debarment process, it does not delve into the procedural safeguards in place to ensure fairness for the affected parties. Further elaboration on the procedural aspects, such as notice, opportunity to be heard, and right of appeal, would enhance the discussion on legality.

Legal certainty is another aspect of the principle of legality, which entails clarity and predictability in the law (Gribnau, 2013). The FAIS Act could benefit from a deeper analysis of how the provisions should be interpreted and applied in practice to ensure consistency and predictability in debarment decisions. This would help ensure that individuals subject to debarment understand the legal basis for such actions and can effectively challenge them if necessary.

Due process typically requires that individuals facing adverse actions, such as debarment, are provided with clear and timely notice of the allegations against them and an adequate opportunity to present their case (Chidede and Osode, 2019). This includes details of the grounds for debarment and sufficient time to prepare a response. Section 14 does not delve deeply into the specific for notice or the extent of the opportunity to respond.

Section 14 does not elaborate on mechanisms to ensure impartiality. Due process also requires that decision-makers remain objective and unbiased throughout the process (Sheuerman, 2009). This may involve measures such as appointing independent adjudicators or establishing review panels to assess debarment decisions objectively.

Debarment in terms of s14 does not explicitly address the right of representatives to legal representation during the debarment process. Due process typically includes the right to legal counsel or representation, especially in proceedings where significant rights or interests are at stake. Legal representation can help ensure that representatives understand their rights, navigate complex legal procedures, and present their case effectively.

While s14 mentions the role of regulatory bodies in overseeing debarment processes, it does not discuss the availability of appeal or review mechanisms for representatives dissatisfied with debarment decisions. Due process often includes avenues for appeal or review to challenge adverse decisions and seek redress for any perceived procedural errors or injustices.

Section 14 debarment touches on the importance of transparency and accountability in the debarment process but does not explore specific measures to promote transparency or mechanisms for holding decision-makers accountable. Due process requires that procedures be transparent and accountable, with clear standards, guidelines, and oversight mechanisms to ensure fairness and integrity.

To enhance procedural fairness and uphold the rights of individuals facing debarment, it is essential to incorporate robust procedural safeguards, including clear notice requirements, opportunities for response, impartial decision-making, right to legal representation, and appeal or review mechanisms.

8.2.2.2 Section 36 of the Constitution

The Constitution, under Section 36, allows for the limitation of rights in certain circumstances, provided that such limitations are justifiable in an open and democratic society based on human dignity, equality, and freedom. While the FAIS Act aims to regulate the financial services industry and protect consumers, the debarment process may limit individuals' right to work without ensuring that these limitations are proportionate, necessary, and justifiable in terms of the Constitution.

The Constitution guarantees individuals the right to fair administrative action, which includes the right to be heard, the right to administrative action that is lawful, reasonable, and procedurally fair, and the right to written reasons for administrative decisions. The debarment process outlined in the FAIS Act may not adequately provide for these procedural safeguards, such as the right to a fair hearing, the right to present evidence and arguments, and the right to written reasons for debarment decisions.

The Constitution protects the right to work under Section 22, which includes the right to choose one's trade, occupation, or profession freely. Any limitations on this right must be justified and reasonable. The debarment process under the FAIS Act may infringe upon individuals' right to work without sufficient justification or consideration of less restrictive alternatives.

The Constitution guarantees the right to just administrative action, which includes the right to have any administrative action reviewed by a court of law (Craig P.P, 1983). The debarment process in the FAIS Act may lack adequate mechanisms for independent review or appeal, thereby limiting individuals' ability to challenge debarment decisions and seek redress for unjust or wrongful debarment.

The Constitution prohibits unfair discrimination and guarantees equality before the law (Woubeshet and Adagbabiri, 2015). The debarment process should ensure that individuals are treated fairly and without discrimination based on arbitrary grounds such as race, gender, or other prohibited grounds. Any disparities or biases in the application of debarment sanctions could potentially violate constitutional principles of equality and non-discrimination. While the FAIS Act provides a regulatory framework for debarment aimed at maintaining the integrity of the financial services industry, there may be areas where it falls short of constitutional standards, particularly regarding the protection of fundamental rights and the principles of procedural fairness, accountability, and equality.

8.2.3 Board notices

Together with other complementary notices such as Board Notices 103, 104, and 105 of 2008, Board Notice 106 establishes a comprehensive set of standards governing the conduct, qualifications, and ongoing professional development of participants in the financial services industry. These notices collectively outline standards and requirements pertaining to the conduct, qualifications, and continuous professional development of individuals operating within this sector.

Board Notice 106, in particular, addresses key aspects. It sets out ethical guidelines and professional conduct expected from participants in the financial services industry. This ensures integrity, transparency, and fair treatment of clients, thereby fostering trust and confidence in the financial services sector.

The notice specifies the minimum educational qualifications and competency requirements for individuals working in various roles within the industry. This helps ensure that professionals possess the necessary knowledge and skills to fulfill their duties effectively and responsibly.

Board Notice 106 emphasizes the importance of continuous learning and development for professionals in the financial services industry. It mandates the completion of relevant training and continuing education programs to keep abreast of industry developments, regulatory changes, and best practices.

8.2.4 Comment in terms of the acceptable framework

8.2.4.1 Common law

One potential shortcoming from these guidelines is the lack of a clear legal basis for some of the requirements outlined in the notices. While they establish criteria and standards for competence, integrity, and suitability, these requirements may not always be explicitly rooted in existing laws or statutes. The principle of legality dictates that any limitation on rights or imposition of obligations should be based on clear and unambiguous legal provisions (Garibaldi, 1976).

The notices provide guidelines for enforcement mechanisms, including audits, inspections, and sanctions for non-compliance. However, the interpretation and application of these mechanisms may involve a degree of subjectivity. This could lead to inconsistencies or arbitrariness in enforcement, potentially undermining the predictability and fairness required by the principle of legality (Hoexter, 2004).

While the notices outline various requirements and standards, they may not always clearly define prohibited conduct or actions that could lead to sanctions such as debarment. The principle of legality requires that individuals be informed of what is prohibited by law to ensure that they can conform their conduct accordingly (Hoexter, 2004).

Although the notices mention sanctions for non-compliance, such as fines, suspension, or debarment, they may not always provide clear guidelines on the circumstances under which these penalties should be imposed. The principle of legality requires that penalties be proportionate, predictable, and prescribed by law to avoid arbitrary or excessive punishment.

While administrative actions under the notices may be subject to review, the scope of judicial review and the extent to which courts can intervene may be limited. This could restrict individuals' ability to challenge decisions that they believe are unlawful or disproportionate, undermining the principle of legality's requirement for effective legal remedies against arbitrary state action.

Due process requires that individuals be provided with adequate notice of any actions against them and an opportunity to respond (Sheuerman, 2009). While Board Notice 106 may outline the criteria and standards for Fit and Proper requirements, it's essential to ensure that individuals are notified of any deficiencies or potential debarment proceedings and given a chance to address them. Without proper notice and an opportunity to be heard, individuals may be deprived of their rights to defend themselves and present evidence in their favor.

Due process often includes the right to legal representation, allowing individuals to seek assistance from legal professionals in navigating complex regulatory matters (Chidede and Osode, 2019). While Board

Notice 106 may not explicitly address this aspect, ensuring that individuals have access to legal counsel can help level the playing field and safeguard their interests during debarment proceedings.

Fairness in administrative actions requires impartial decision-making by competent authorities (Zubair and Khattak, 2014). In the context of debarment under Board Notice 106, it's essential to ensure that decision-makers are free from bias or conflicts of interest and base their judgments solely on the evidence and applicable laws or regulations. Lack of impartiality in decision-making can undermine the legitimacy of debarment proceedings and erode trust in the regulatory framework.

Due process often includes mechanisms for individuals to appeal or seek review of adverse decisions (Sheuerman, 2009). While Board Notice 106 may specify enforcement mechanisms for non-compliance, it's crucial to provide avenues for individuals to challenge debarment decisions through administrative or judicial review. This allows for a fair and transparent process of redress in cases where individuals believe their rights have been infringed or decisions are unjust.

Due process requires clear and consistent procedures that are applied uniformly to all individuals subject to regulatory actions (Sheuerman, 2009). Board Notice 106 should provide clear guidelines on the debarment process, including timelines, documentation requirements, and steps for appeal or review. Lack of clarity or consistency in procedures can lead to confusion, procedural errors, and potential violations of due process rights.

8.2.4.2 Section 36 of the Constitution

Section 36 of the Constitution mandates that any limitation on rights must be justified in a democratic society based on factors such as human dignity, equality, and freedom. While ensuring competence and integrity in the financial services industry is essential, the framework clearly demonstrates how limitations on the right to work serve a legitimate purpose within these constitutional principles.

The limitations imposed by the regulatory framework, such as debarment under the FAIS Act, must be proportional to the importance of the purpose they serve. This means that the severity of the limitation should be balanced against the significance of the goal it aims to achieve. There should be a clear demonstration that the restrictions placed on individuals' right to work are commensurate with the need to protect consumers and maintain market integrity.

Section 36 requires that limitations on rights be imposed through laws of general application, ensuring transparency and accountability in the regulatory process. While the FAIS Act provides a legal basis for regulating the financial services industry, it is essential to ensure that the specific provisions, such as those outlined in Board Notice 106, comply with this requirement and are not arbitrary or ad hoc measures.

Individuals subject to limitations on their right to work should have access to fair and transparent procedures for challenging decisions that affect their livelihoods. This includes mechanisms for appeal and independent oversight to ensure that limitations are applied consistently and fairly across the industry. The regulatory framework should provide clear avenues for individuals to seek redress if they believe their rights have been unfairly restricted.

8.3 Statutory debarment court cases

8.3.1 Odinfin (Pty) LTD v Reynecke (906/2016) ZASCA 115

8.3.1.1 Facts

This case relates to the interpretation of what the legislature intended to regulate when enacting the FAIS Act.

On 12 August 2010, Pieter Reynecke (Reynecke), and the appellant, Odinfin (Pty) Ltd (Odinfin), a registered financial services provider (FSP), entered a written employment contract in terms of which the former agreed to render financial services as a representative on behalf of Odinfin. Three years later Reynecke, so he alleged, became disillusioned with the conditions of his employment, and sought new employment with Nedbank Limited (Nedbank), also a registered FSP, without prior written approval of Odinfin. On 15 April 2013, whilst still employed by Odinfin, he entered into a written employment agreement with Nedbank. Although his position was described as 'Financial Planner', his duties were similar to those he rendered to Odinfin. As such he remained a representative in terms of the FAIS Act.

Unknown to Reynecke, on 8 May 2013 Odinfin learnt that he was undergoing an induction with Nedbank. Odinfin confronted him with this information but, instead of owning up, Reynecke denied that he was seeking employment with Nedbank. Instead, he falsely misrepresented to Odinfin that he was in Heidelberg writing and selling new policies on behalf of Odinfin when, in fact, he was attending the induction. As Odinfin was aware that this information was incorrect, it requested him to furnish proof that he was indeed in Heidelberg, which he refused to do. Odinfin then contacted Nedbank to verify the information it had received regarding his employment. Nedbank confirmed the information and in addition confirmed that Reynecke was in fact attending an induction programme.

Satisfied with the information received from Nedbank, Odinfin suspended Reynecke and commenced disciplinary proceedings against him. On 10 May 2013 it served on him a notice of a disciplinary hearing to answer three charges, namely dishonesty, competing with his employer and conflict of interest, all stemming from the conduct summarised above. The disciplinary enquiry was scheduled for 16 May 2013 at 10h00. In response Reynecke tendered a letter of resignation effective from 13 May 2013. Odinfin immediately replied, pointing out to him that in terms of his employment agreement it was entitled to a four weeks' notice period with effect from the 13 May 2013. That meant that as at the date of the hearing he would still be Odinfin's employee and was expected to attend the enquiry.

On the morning of the disciplinary hearing, he was reminded of the hearing. He informed Odinfin that he was not interested and would not be attending the hearing. The hearing proceeded in his absence. After hearing Odinfin's witnesses the chairman of the disciplinary enquiry found Reynecke guilty of the three charges levelled against him. The chairman recommended that his employment agreement be terminated with immediate effect. This Odinfin did.

Section 13(3) of the FAIS Act imposes an obligation on FSPs to maintain a register of their representatives. All representatives are required, inter alia, to comply with the 'fit and proper' requirements set out in s 6A. These include 'personal character qualities of honesty and integrity'. In terms of s 14(1) read with s 13(3) an FSP is required to remove the name of a representative from its register if, inter alia, he or she is no longer a fit and proper person. In terms of s 14(3) the FSP must inform the registrar of financial institutions of the debarring and the registrar may make known such debarment and the reasons therefor by notice on the official web site or by means of any other appropriate public media.

After Reynecke's dismissal Odinfin updated its register in terms of s 14(1) read with s13(3) to reflect that Reynecke had lost the status of being a fit and proper person who was honest and had integrity and that he was debarred from providing any new financial services on Odinfin's behalf. As required by s 14(3)(a), Odinfin notified the registrar accordingly. The registrar, as permitted by s 14(3)(b), published the debarment by notice on the official website. At some stage thereafter Nedbank conducted a background check on Reynecke. This revealed that the registrar had noted his debarment. Nedbank then also terminated his employment agreement.

8.3.1.2 Decision of the court

The court held that the public is entitled to know that representatives possess honesty and integrity, otherwise even rogue persons could act as representatives without the public at large knowing. The victims would not only be members of the public but financial institutions as well. A country which allowed rogue persons to act as representatives would be poorer for it.

8.3.2 Comment: Debarment in terms of the framework

8.3.2.1 Common Law

The case lacks detailed information about whether the disciplinary proceedings conducted by Odinfin fully complied with the procedural requirements outlined in the FAIS Act. The Act specifies certain procedural safeguards that must be followed during disciplinary proceedings, such as providing the accused representative with an opportunity to respond to the charges and present their case. Without clarity on whether these procedures were followed, it is difficult to assess the procedural fairness of the disciplinary process.

While Reynecke was found guilty of dishonesty, competing with his employer, and conflict of interest by the disciplinary committee, the specific evidence supporting these charges is not provided in detail. The FAIS Act requires that disciplinary decisions be based on credible evidence of misconduct. Without a clear presentation of the evidence considered by the disciplinary committee, it is challenging to evaluate whether the decision to debar Reynecke was justified under the Act.

The case does not explicitly mention whether any mitigating factors were considered during the disciplinary proceedings or the debarment decision-making process. The FAIS Act allows for the consideration of mitigating factors that may affect the severity of disciplinary measures imposed on representatives. Without information on whether such factors were taken into account, it is unclear whether the debarment decision adequately weighed all relevant circumstances.

While the court emphasized the importance of transparency in ensuring that representatives possess honesty and integrity, the case does not provide insights into how Odinfin communicated the debarment decision to relevant stakeholders, such as the registrar of financial institutions or the public. The FAIS Act mandates FSPs to notify the registrar of debarments and publish such information to maintain transparency and accountability within the industry. Without clarity on how Odinfin fulfilled these obligations, the effectiveness of regulatory oversight remains uncertain.

In summary, while the case touches on elements of the regulatory framework established by the FAIS Act, it lacks sufficient detail to assess whether the disciplinary proceedings and debarment decision fully complied with the Act's requirements regarding procedural fairness, evidentiary standards, consideration of mitigating factors, and transparency.

8.3.2.2 S36 of the Constitution

While Reynecke was notified of the disciplinary hearing and the charges against him, the fact that the hearing proceeded in his absence raises questions about procedural fairness. Although he tendered his resignation, Odinfin argued that he was still under a notice period and thus expected to attend the hearing. However, Reynecke's absence may have deprived him of the opportunity to present his side of the story and defend himself against the allegations. This raises concerns about whether Reynecke was afforded adequate procedural fairness in the disciplinary process.

While the decision to debar Reynecke may have been based on serious allegations of dishonesty and lack of integrity, it's essential to assess whether the debarment was proportionate to the gravity of the alleged misconduct. Considering that Reynecke was accused of misrepresenting his actions and attending an induction with a competing firm while still employed by Odinfin, the severity of the punishment (debarment) vis-a-vis the misconduct should be evaluated.

While maintaining honesty and integrity among representatives is undoubtedly a legitimate purpose, it's essential to assess whether the limitation on Reynecke's right to work was directly related to achieving this purpose. The decision to debar Reynecke was aimed at upholding industry standards and protecting consumers. However, questions may arise about whether the debarment was the most appropriate or proportionate measure to address the alleged misconduct, especially considering Reynecke's employment status at the time of the disciplinary proceedings.

Overall, while the case may raise concerns about procedural fairness and the proportionality of the limitation imposed on Reynecke's right to work, further analysis would be necessary to determine whether these aspects constitute a violation of the principles outlined in Section 36 of the Constitution.

8.3.3 Financial Service Board v Barthram (202007/2014) [2015] ZASCA 96

8.3.3.1 Facts

This case relates to the interpretation on s14 and s14A of the FAIS Act (s14A has been replaced by s153 of the FSR Act).

Mr Barthram and Discovery Life Limited (an FSP) entered concluded a contract of employment on the 15th of September 2009. Mr Barthram was appointed as a full-time employee to market and sell the products and policies and to provide financial services in relation to the products and policies to existing and prospective clients of Discovery.

Mr Barthram purported to terminate his employment contract on 24 hours' notice on the 31st of May 2012. This comes after he found another job with Old Mutual Life Insurance Limited which he was to commence a day after his notice with Discovery. On the 12 of June 2012, Mr Barthram was informed by Discovery's Chief Compliance Officer that Discovery had taken the decision to notify the FSB i.e., the Registrar of Financial Services Providers, that Mr Barthram did not comply with the requirements of the FAIS for continued appointment as a representative of Discovery. Following this, Mr Barthram was listed on the FSB's website as a debarred representative.

Amongst other issues, one of the issues which was to be decided by the court was an issue raised by Ms Meintjes on behalf of Discovery in opposing Mr Barthram's application to have his debarment lifted. Ms Meintjes stated: (Para 6)

'The Applicant has failed to draw the vital distinction between what is contained in sections 14 and 14A of the FAIS Act. Section 14 of the Act, although styled "Debarment of Representatives" effectively allows for the removal by a financial services provider (such as the First Respondent) of a representative (such as the Applicant) from the statutorily required register. The effect thereof is that the representative can no longer represent that particular financial services provider in the rendering of any financial services. Conversely, section 14A of the FAIS Act deals with the debarment by the Registrar of “a person” rather than a representative. Section 14A debarment precludes a representative from rendering any financial services on behalf of any services provider for a specified period.

In effect, the debarment by the Registrar of a person in terms of section 14A of the FAIS Act precludes such person from rendering financial services on behalf of any services provider whereas a debarment in terms of section 14(1) of the FAIS Act precludes the debarred representative only from representing a particular services provider who effects the debarment. In the result, the effect of the removal of the Applicant from the First Respondent’s register (the debarment in terms of section 14(1) of the FAIS Act) did not and will not preclude the Applicant from rendering financial services on behalf of his new employer, Old Mutual. That prohibition could only arise from a debarment by the Registrar as contemplated in section 14A of the FAIS Act read together with section 9(2) thereof – the withdrawal of the Applicant’s license to act as a financial services provider/insurance intermediary at all.’

8.3.3.2 Decision of the court

Dealing with this issue the court held that the debarment of the representative by a FSP is evidence that it no longer regards the representative who does not meet those requirements lacks the character qualities of honesty and integrity or lacks competence and thereby poses a risk to the investing public generally. Such a person ought not to be unleashed on an unsuspecting public and it must therefore follow that any representative debarred in terms of s14, must perforce be debarred on an industry-wide basis.

8.3.4 Comment: Debarment in terms of the framework

8.3.4.1 Common Law

The court's interpretation of sections 14 and 14A of the FAIS Act suggests a lack of clarity in the legislation. The distinction between debarment by a financial services provider (FSP) under section 14 and debarment by the Registrar under section 14A may not be adequately defined or understood. This lack of clarity can lead to confusion regarding the legal consequences of debarment and may result in inconsistent application of the law.

The court's decision implies that debarment by an FSP effectively results in industry-wide debarment, even though the FAIS Act does not explicitly provide for such a consequence. This interpretation raises concerns about the potential for arbitrary application of debarment measures, where representatives may be debarred based on subjective assessments of their character or competence by FSPs, without clear legal standards or safeguards.

The case raises questions about the adequacy of legal safeguards for individuals facing debarment. If debarment by an FSP can lead to industry-wide consequences without explicit statutory authority, representatives may be deprived of their livelihoods without sufficient procedural protections or avenues for appeal. This lack of procedural fairness may undermine the rule of law by allowing for arbitrary exercises of power by private entities.

Debarment measures under the FAIS Act may potentially infringe upon individuals' fundamental rights, such as the right to work or the right to engage in economic activity. If debarment is imposed without clear legal standards or justification, it may disproportionately restrict individuals' rights without adequate legal basis, raising constitutional concerns.

One of the fundamental aspects of due process is providing adequate notice and an opportunity to be heard (Chidede and Osode, 2019). In this case, Mr. Barthram purportedly terminated his employment contract with Discovery, only to be informed later that he was being debarred by Discovery. The sequence of events suggests that Mr. Barthram may not have been given prior notice of the intended debarment or an opportunity to respond before the decision was made. This lack of notice and opportunity to respond undermines the principle of procedural fairness.

Due process requires that decisions be made by impartial decision-makers. While the court's decision upheld Mr. Barthram's debarment on an industry-wide basis, it's important to ensure that the decision-making process is free from bias or influence. The court's reasoning, while focused on protecting the public interest, may overlook the individual's right to a fair hearing and impartial adjudication.

Another aspect of due process is the right to legal representation. Mr. Barthram's ability to effectively present his case and defend himself against the allegations of non-compliance with FAIS requirements may have been compromised if he was not provided with adequate legal representation during the proceedings.

Due process requires transparent and accountable procedures (Sheuerman, 2009). It's essential to establish clear criteria for debarment and mechanisms for providing notice, opportunity to respond, and avenues for appeal or review. Any deviations from these procedural requirements risk undermining the integrity and legitimacy of the debarment process.

8.3.4.2 S36 of the Constitution

It is fundamentally important to analyze s36 together with other sections in the Constitution. The principle of presumption of innocence, enshrined in Section 35(3)(h) of the South African Constitution, dictates that individuals are considered innocent until proven guilty. However, the court's decision seems to presume guilt based solely on the debarment decision by the financial services provider, without affording Mr. Barthram the opportunity to contest the allegations against him or present evidence in his defense. This contravenes the constitutional guarantee of fair trial rights and the presumption of innocence.

Section 33 of the Constitution guarantees the right to administrative action that is lawful, reasonable, and procedurally fair. Administrative actions, such as debarment decisions, must adhere to the principles of procedural fairness, including the right to be heard and the right to reasons for the decision. However, the court's decision does not provide clarity on whether Mr. Barthram was afforded these procedural safeguards, raising concerns about compliance with the constitutional right to administrative justice.

Section 9 of the Constitution guarantees the right to equality and prohibits unfair discrimination. Any limitations on the right to work, such as debarment, must be applied in a manner that is non-discriminatory and based on objective criteria. However, the decision to impose industry-wide debarment, based solely on the debarment by one financial services provider, may disproportionately affect Mr. Barthram and others in similar situations, potentially infringing upon their right to equality.

Section 22 of the Constitution protects the right to choose one's trade, occupation, or profession freely. While limitations on this right may be justified in certain circumstances, such as protecting the public interest, any restrictions must be reasonable and proportionate. The court's decision to impose industry-wide debarment without individualized assessment or consideration of less restrictive measures may unduly limit Mr. Barthram's right to work and could potentially infringe upon this constitutional right.

8.3.5 Comment: Debarment in terms of the framework

8.3.5.1 Common Law

The case lacks clarity in the legal framework governing debarment of former representatives under the FAIS Act. While the Appeal Board's decision suggests a broader interpretation allowing for debarment of former representatives, the FAIS Act itself may not explicitly address this scenario. This lack of clarity can lead to inconsistencies and disputes in the application of debarment provisions.

There are potential due process concerns in the case, particularly regarding Michelle's involvement in the disciplinary proceedings during her notice period. If Michelle was not given a fair opportunity to participate in the disciplinary process and defend herself against the allegations, it could raise questions about procedural fairness and adherence to due process principles.

The case highlights the importance of transparency and accountability in disciplinary actions taken by FSPs. However, the lack of detailed information about the disciplinary proceedings and Michelle's involvement leaves room for uncertainty regarding the transparency and fairness of the process. Without clear guidelines and procedures, there may be inconsistencies in how FSPs handle misconduct allegations and subsequent debarment decisions.

While the Appeal Board's decision may align with certain legal principles, such as basing the debarment on acts committed during Michelle's employment, there may be questions about the consistency of this approach with broader legal principles such as the rule of law and the protection of fundamental rights. Further clarification and alignment with these legal principles are necessary to ensure the legitimacy and fairness of debarment decisions.

Overall, the case underscores the need for clarity, transparency, and consistency in the legal framework governing debarment under the FAIS Act, as well as the importance of upholding due process principles to safeguard the rights of individuals involved in disciplinary proceedings.

8.3.5.2 S36 of the Constitution

The case of Michelle being debarred by Mirabilis after she had resigned presents an interesting scenario in the context of Section 36 of the Constitution of South Africa, which deals with limitations on rights. Section 36 requires that any limitation on rights must be done in a manner that is fair and just. In Michelle's case, the debarment occurred after she had already resigned from her position at Mirabilis. There might be questions regarding whether she was given adequate notice of the disciplinary proceedings, whether she had an opportunity to defend herself, and whether the debarment decision was made impartially. If these procedural aspects were not adequately addressed, it could be argued that the debarment infringed upon Michelle's rights without due process.

Section 36 also mandates that any limitation on rights must be proportional to the importance of the purpose being pursued. In Michelle's case, the debarment was imposed after she had already resigned, and there might be questions about the necessity and proportionality of such a measure. If the impugned acts occurred during her employment and were serious breaches of financial regulations, then the debarment might be seen as proportional. However, if the acts were minor or unrelated to her role as a representative, then the debarment might be viewed as disproportionate.

Section 36 requires that any limitation on rights must be reasonable and justifiable in an open and democratic society. In Michelle's case, the question arises whether it was reasonable for Mirabilis to debar her after she had already resigned. If the impugned acts were serious and posed a risk to the financial system, then the debarment might be seen as reasonable. However, if the debarment was imposed as a punitive measure after Michelle had already left the company, then it might be viewed as unjustified.

8.3.6 Associated Portfolio Solutions (Pty) Ltd & Another v Basson & Others (554/2019) [2020] ZASCA 64 (12 June 2020)

8.3.6.1 facts

Mr. Pieter Willem Basson, an employee and representative of APS and Pentagon (financial service providers), was found guilty of multiple charges in a disciplinary inquiry. The appellants (APS and Pentagon) sought advice from Moonstone Compliance on how to proceed following the guilty findings. Moonstone advised debarment due to material contravention of the FAIS Act and lack of honesty and integrity.

On 4 May 2017, the appellants issued notices of a directors' meeting scheduled for 17 May 2017 to consider Basson’s debarment. Basson’s attorneys made representations on 17 May 2017, disputing the disciplinary findings and warning of legal action. Neither Basson nor his attorneys attended the meeting, and the board passed resolutions to remove, dismiss, and debar Basson. The debarment was communicated to the Financial Services Board (FSB) and Basson was officially debarred on 1 June 2017.

Basson launched a review application in the high court, claiming he wasn’t given a fair opportunity to make representations and alleging bias by the directors. In response, APS and Pentagon filed a counter-application against Basson's re-appointment by Rebalance Fund Managers and later Vision Risk and Investment Consultants.

The high court found that disciplinary and debarment processes were distinct and that a separate debarment inquiry was necessary under the FAIS Act. The court also held that only the appointing FSP was responsible for ensuring compliance with the re-appointment requirements.

The appellants argued that their duty to debar Basson stemmed directly from the disciplinary findings and that no separate inquiry was needed. Basson continued to assert procedural unfairness and bias.

The FAIS Act mandates FSPs to ensure their representatives are fit and proper and to debar those who aren’t. Debarment procedures must be lawful, reasonable, and procedurally fair, with adequate notice and opportunity for the affected person to respond.

8.3.6.2 Court of Appeal Findings

The court found that Basson had been given adequate notice and the opportunity to make representations.

The disciplinary findings directly impacted Basson’s fitness and propriety, negating the need for a separate debarment inquiry.

The court rejected the argument that the appellants were biased or had ulterior motives, affirming that the debarment was procedurally fair and justified based on the established facts.

8.3.6.3 Comment on debarment in terms of the common law

The principle of legality, as derived from common law, requires that debarment must be based on a clear legal prohibition. This means that before any process can be launched against an individual, there must be a specific and pre-existing legal prohibition that has been violated.

In Mr. Basson's case, while the disciplinary findings served as a basis for debarment, the court did not require a separate debarment inquiry, which could be seen as bypassing the need for a distinct legal prohibition specifically tailored to debarment, rather than disciplinary action. The common principle of legality would expect a clear distinction and specific criteria for debarment itself, separate from disciplinary procedures.

Although Mr. Basson was given notice and an opportunity to make representations, he and his attorneys did not attend the debarment meeting. The decision to debar him without his presence could be perceived as lacking full adherence to procedural fairness, as the common law framework would expect exhaustive measures to ensure the individual’s participation in the process.

In Mr. Basson’s case, the debarment decision was made by the board of directors who were involved in the disciplinary process, potentially raising concerns about impartiality. Due advocates for a separate, impartial body to review the case for debarment to avoid any conflicts of interest or biases stemming from previous disciplinary involvement.

The high court's differentiation between disciplinary and debarment processes underscores the need for due process specific to debarment. In Mr. Basson’s case, combining disciplinary findings directly with debarment without a separate due process may infringe on the right to work, as common law would demand a clear, justified, and procedurally distinct debarment process.

Similarly, for Ms. Mokgobi, the absence of a disciplinary hearing and direct movement to debarment based on an investigation might not fully satisfy the due process requirements under common law.

8.3.6.4 Comment on debarment in terms of the Constitution

Section 33 guarantees everyone the right to administrative action that is lawful, reasonable, and procedurally fair. Individuals must receive adequate notice and a fair opportunity to make representations before adverse administrative actions are taken.

Basson claimed he wasn’t given a fair opportunity to make representations and alleged bias by the directors. Although he received notice and his attorneys made representations, neither Basson nor his attorneys attended the critical directors' meeting where the debarment decision was made. This raises questions about whether he had a meaningful opportunity to defend himself in the debarment process, distinct from the disciplinary process.

The high court found that disciplinary and debarment processes are distinct and that a separate debarment inquiry was necessary under the FAIS Act. The appellants relied solely on the disciplinary findings without conducting a separate, detailed debarment inquiry. This approach does not align with the constitutional requirement for a lawful and fair procedure specific to debarment.

Section 36 allows for the limitation of rights only if it is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom. The limitation must serve a legitimate purpose, be proportional to the aim pursued, and be the least restrictive means available.

Aligning the debarment process with constitutional principles is essential to ensure that significant limitations on fundamental rights, such as the right to work, are lawful, reasonable, procedurally fair, and justified in a democratic society.

8.4 Statutory debarment FCSA tribunal decisions

8.4.1 Charmaine Mokgobi v Capitec Bank Ltd FSP27/2023

8.4.1.1 Facts

FAIS Act as well as the FSR Act regulate the financial services markets, this includes regulation of banks and other financial institutions such as consulting firms etc. It is important to broaden this study to also include cases relating to other financial institutions and not limit the study to insurance cases. The Mokgobi case relates to the banking sector.

In this case, Charmaine Mokgobi applied to the Tribunal to have her debarment set aside. Her debarment came after she had allegedly issued a fraudulent loan agreement to a client, the loan amounted to R180 000. Capitec Bank, the employer and FSP issued a notice of debarment on 19 December 2022 on two grounds; noncompliance with the fit and proper requirements as postulated by section 13(2)(a) of the FAIS Act as well as, contravention of failure to comply with the provisions of the FAIS Act in material manner.

8.4.1.2 Decision of the court

The Tribunal found that an investigation was conducted but disciplinary hearing was not conducted, and this was as a result of the applicant's intent by agreeing to the termination of employment. The Tribunal also found that the applicant had conceded her dishonesty and Capitec was legally obliged to debar her.

8.4.2 Comment: Debarment in terms of the framework

The principle of legality, as derived from common law, requires that debarment must be based on a clear legal prohibition. This means that before any process can be launched against an individual, there must be a specific and pre-existing legal prohibition that has been violated.

In Ms. Mokgobi's case, the lack of a disciplinary hearing, even though she agreed to terminate employment, might be viewed as insufficient under common law standards. Procedural fairness under common law typically requires a formal hearing to ensure that all facts are thoroughly examined and contested before a debarment decision is made.

8.4.2.1 Common Law

The case indicates that no disciplinary hearing was conducted due to the applicant's agreement to the termination of her employment. While the applicant may have consented to termination, the absence of a formal disciplinary process raises concerns about procedural fairness. The acceptable framework emphasizes the importance of due process and fair procedures in the debarment process, including the right to a hearing and the opportunity to respond to allegations. The lack of a disciplinary hearing undermines these principles and raises questions about the adequacy of the process followed by Capitec Bank.

While the Tribunal found that Capitec Bank was legally obliged to debar the applicant based on her concession of dishonesty and noncompliance with regulatory requirements, it's essential to ensure that debarment decisions are based on clear legal grounds. The acceptable framework emphasizes the principle of legality, which requires limitations on fundamental rights to be based on existing laws and prohibitions. Without a clear legal basis for debarment, there may be questions about the validity and fairness of the decision.

The case mentions that an investigation was conducted, but it's unclear whether the findings of this investigation were adequately presented or substantiated. The framework highlights the importance of evidence-based decision-making and the need for clear evidence to support debarment decisions. Without a transparent and robust investigative process, there may be doubts about the reliability and validity of the allegations against the applicant.

The case does not provide information about whether mitigating factors or circumstances were considered in the debarment decision. The framework emphasizes the importance of considering all relevant factors, including mitigating circumstances, in determining the appropriate course of action. Without adequate consideration of mitigating factors, there may be concerns about the fairness and proportionality of the debarment decision.

Overall, the case falls short of the acceptable framework's principles regarding procedural fairness, legal basis, evidence-based decision-making, and consideration of mitigating factors. These shortcomings raise questions about the validity and fairness of the debarment decision and underscore the importance of adherence to established principles and standards in the debarment process.

8.4.2.2 S36 of the Constitution

Section 36 requires that any limitation on rights must be proportional to the purpose it seeks to achieve. In this case, while Capitec Bank debarred Charmaine Mokgobi based on alleged fraudulent conduct, there is no explicit discussion in the provided information about whether the debarment was proportional to the severity of the alleged offense. Without a clear demonstration of proportionality, there may be questions about whether the limitation on Mokgobi's rights was justified.

Section 36 also emphasizes the importance of fair procedures when limiting rights. While the case mentions that an investigation was conducted, it notes that no disciplinary hearing was held due to Mokgobi's agreement to termination of employment. The lack of a disciplinary hearing raises concerns about whether Mokgobi was afforded due process rights and the opportunity to defend herself adequately. Fair procedures are essential to ensure that limitations on rights are not arbitrary or unjustified.

Section 36 requires consideration of whether there are less restrictive means available to achieve the purpose of the limitation. It is not clear from the information provided whether Capitec Bank explored alternative measures before resorting to debarment. Without evidence that less restrictive measures were considered, there may be questions about whether the debarment was necessary or whether other interventions could have been pursued.

Section 36 also emphasizes the role of judicial review in assessing the constitutionality of limitations on rights. While the case mentions that Mokgobi applied to the Tribunal to have her debarment set aside, there is no indication of any further judicial review of the decision. Judicial review is crucial to ensure that limitations on rights comply with constitutional principles and that individuals have recourse to challenge unjustified limitations.

Overall, while the case involves limitations on rights within the context of financial regulation, it falls short of fully addressing the requirements set out in Section 36 of the Constitution. Concerns about proportionality, fair procedure, consideration of less restrictive means, and judicial review may indicate potential shortcomings in the alignment of the debarment decision with constitutional principles.

8.4.3 Michelle Hollenbach v Mirabilis Engineering Underwriting Managers PTY A9/2016

8.4.3.1 Facts

This case presented a different issue relating to debarment as the previous case analyzed, the issue is whether an FSP can debar a former employee. Michelle was debarred by Mirabilis a few months after she resigned as a representative of Mirabilis, this followed a disciplinary enquiry into her conduct when she was a representative of Mirabilis. The enquiry started while she was serving her notice period of resignation. Michelle case is that an FSP may only debar a person who at the time of debarment, is a representative of the FSP and this means that the debarment was unlawful being beyond the jurisdiction of the FSP.

8.4.3.2 Decision of the court

On this issue the Appeal Board of the Financial Services Board adopted the same approach as in *Financial Services Board v Barthram* that an FSP may debar a former representative provided the impugned acts were committed during the period of employment.

8.4.4 Lufuno Precious Shiburi v Liquid Capital Pty Ltd FSP8/2023

8.4.4.1 Facts

This case brings a different element when it comes to debarment in the financial services markets regarding what conduct may not warrant debarment of a representative. According to the ruling in this case, only conduct relating to rendering of the financial services may be considered when debarring an individual. Although this explanation was derived from employment policy, it should noted that such employment policy is based on the FAIS Act recommendations on FSPs to have processes in place when debarring an individual. In this Liquid Capital case, this employment policy is paramount in that the Tribunal relied on it to review and set aside the debarment. The Tribunal also found that FSPs cannot base their decision to debar on the outcome of DC hearing but should look into questioning whether there was evidence in the hearing that objectively established that the representative's character can still retain the essential qualities of honesty and integrity such that the name of the representative remains unblemished. This will usually be established on an independent enquiry. This case is very important in painting a picture of some conducts which may not warrant debarment i.e., conduct that does not relate to rendering financial services.

Facts of Liquid Capital case are as follows; Lufuno was employed by Liquid Capital as a Sales Agent since 2016. A hearing was conducted in February 2022 after she was alleged to committed fraud by presenting falsified uber receipts. She submitted the receipts for the purpose of being reimbursed by Liquid Capital. Liquid Capital provided that, Lufuno was dishonest based on the outcome of the DC hearing and the decision was taken to debar her. She appealed the decision to debar her in the Tribunal.

8.4.4.2 Decision of the court

The Tribunal cautioned FSPs not to issue a debarment purely on the outcome of the disciplinary hearing. A separate independent inquiry must be conducted in the debarment hearing, and it must be factually established that the conduct is so serious and material that it has impugned the representative's fit and proper characteristics. The Tribunal found in favour of Lufuno.

8.4.5 Comment: Debarment in terms of the framework

8.4.5.1 Common Law

The Liquid Capital case presents a valuable perspective on the debarment process within the financial services industry, particularly in emphasizing the need for independent inquiries and focusing on conduct directly related to financial services. However, it also falls short in certain aspects when compared to the acceptable framework.

While the case emphasizes the importance of considering only conduct related to the rendering of financial services when determining debarment, it doesn't provide a comprehensive framework for evaluating such conduct. The acceptable framework includes a detailed analysis of principles such as due process, legality, and proportionality, which ensure that debarment decisions are fair, transparent, and legally sound. The Liquid Capital case could benefit from a more robust examination of these principles to provide a broader context for evaluating debarment decisions.

The case primarily focuses on the procedural aspects of the debarment process, such as the need for independent inquiries and the requirement to consider only conduct related to financial services. However, it lacks a thorough legal analysis of how these procedural requirements align with existing laws, regulations, and constitutional principles. The acceptable framework incorporates a detailed examination of legal principles such as the right to work, due process, and the principle of legality, providing a solid legal foundation for evaluating debarment decisions. The Liquid Capital case could benefit from a similar legal analysis to ensure that debarment decisions are consistent with legal requirements.

While the case emphasizes the importance of procedural fairness in the debarment process, it doesn't provide specific guidance on procedural safeguards that should be in place to protect the rights of representatives facing debarment. The acceptable framework includes principles such as notice, opportunity to respond, right to legal representation, and impartial decision-making, which are essential procedural safeguards to ensure a fair and transparent debarment process. The Liquid Capital case could benefit from incorporating these procedural safeguards to enhance the fairness and integrity of the debarment process.

While the Liquid Capital case offers valuable insights into certain aspects of the debarment process within the financial services industry, it falls short of providing a comprehensive framework for evaluating debarment decisions. By incorporating a more thorough legal analysis and procedural safeguards, the case could better align with the acceptable framework and provide a more robust foundation for evaluating debarment decisions.

8.4.5.2 S36 of the Constitution

While the case emphasizes the need for an independent inquiry and factual establishment of serious misconduct before debarment, it does not explicitly address whether the debarment decision was proportional or reasonable in the context of Section 36. A deeper analysis of whether the debarment decision struck a fair balance between the public interest in protecting consumers and the individual's right to work could enhance alignment with the Section 36 framework.

Section 36 requires that limitations on rights be subject to review by the courts to ensure compliance with constitutional principles. While the Tribunal reviewed the debarment decision in this case, further clarity on the process of judicial review and how it ensures accountability for limitations on the right to work would strengthen alignment with Section 36.

Section 36 also mandates considering whether less restrictive means are available to achieve the intended purpose of the limitation. The case does not explicitly discuss whether alternative measures short of debarment were considered or implemented, which could impact the proportionality and reasonableness of the debarment decision.

Overall, while the Liquid Capital case provides important guidance on the factors to consider before debarment and emphasizes the need for an independent inquiry, further analysis within the acceptable framework could enhance clarity on the proportionality, reasonableness, and accountability of debarment decisions in the financial services industry.

8.4.6 Mpho Nemukula v A C Capital Pty Ltd FSP21/2023

8.4.6.1 Facts

It is very hard to hard to relate the court's decision on this case and the decision on Liquid Capital case. In this case the Tribunal found that failure to return company's tablet may constitute dishonesty and lack of integrity. Debarment may be enforced on these grounds as per decision by the tribunal. Failure to return a tablet is not related to providing financial advice, more so because such a tablet was never used for the purpose of providing financial advice. The tribunal in Liquid Capital case found that only conduct relating to providing financial advice may be considered when debarring an individual. The conduct in this case is not related to providing financial advice.

Mpho was recruited by A C Capital to become its representative, effect from December 2021. He was provided with a tablet which remained the property of A C Capital. The tablet was never utilised for anything related to A C Capital and Mpho did not commence the performance of any duties for A C Capital. A C Capital terminated the employment on 11 August 2022 as a result of desertion of his position by Mpho and also attempted to secure the tablet back with no luck. The tablet was never returned. A C Capital therefore debarred Mpho for the theft of the tablet for being non-compliant with the Fit and Proper Requirements of the FAIS Act, and for lacking honesty and integrity. The debarment decision was taken on 27 February 2023.

When approaching the tribunal, Mpho made the following submission;

Mpho seeks the reconsideration of the debarment decision on the grounds that:

> He never commenced employment with the Respondent and therefore it cannot debar him;
>
> He was unaware of the debarment process being undertaken; and
>
> The Respondent ought to have filed a criminal case against him for the theft of the tablet rather than pursued his debarment.

8.4.6.2 Decision of the court

The tribunal found that, the persistent failure to return the tablet to A C Capital is material and demonstrates dishonesty and/or a lack of integrity as is demanded of a representative under the FAIS Act. The tribunal found in favour of A C Capital and uphold the debarment.

8.4.7 Comment: Debarment in terms of the framework

8.4.7.1 Common Law

The *Mpho vs A C Capital* case deviates from the established framework for assessing debarment decisions in the financial services industry. The decision in this case appears to depart from the principle set in the Liquid Capital case, where it was emphasized that debarment should primarily be considered for conduct directly related to providing financial advice. In contrast, the tribunal in the Mpho case extends the grounds for debarment to include actions unrelated to financial advice, such as the failure to return a company's tablet. This inconsistency in assessing conduct undermines the coherence and predictability of the debarment process.

The decision lacks explicit consideration of proportionality and due process. While the tribunal finds Mpho's failure to return the tablet as indicative of dishonesty or lack of integrity, it does not assess whether debarment is a proportionate response to this misconduct, especially considering that Mpho never commenced employment with A C Capital. Additionally, there is no indication that Mpho was given an opportunity to respond to the allegations or present his side of the story before the debarment decision was made. This failure to consider proportionality and due process raises concerns about the fairness of the debarment process.

The decision does not provide a thorough analysis of how its findings align with relevant legal standards, particularly those outlined in the FAIS Act. While the decision references the requirements of the FAIS Act regarding the fit and proper conduct of representatives, it does not offer a detailed legal analysis to support its conclusion that Mpho's failure to return the tablet warrants debarment. This lack of legal analysis weakens the rationale behind the debarment decision and may raise questions about its legal validity.

Overall, the Mpho case falls short of the acceptable framework for assessing debarment decisions in the financial services industry by deviating from established principles regarding the assessment of conduct warranting debarment, the consideration of proportionality and due process, and the analysis of relevant legal standards. Addressing these shortcomings is essential to ensure transparency, consistency, and fairness in the debarment process.

8.4.7.2 S36 of the Constitution

Section 36 requires that any limitation on rights serves a legitimate aim, such as protecting public order, health, or the rights of others. In this case, the aim of the debarment decision by A C Capital was to address the alleged misconduct of failing to return the company's tablet, which was deemed to demonstrate dishonesty and lack of integrity. However, it's arguable whether this aim sufficiently justifies the limitation of Mpho's right to work.

The limitation imposed on Mpho's right to work through debarment must be proportional to the importance of the purpose it seeks to achieve. While failure to return the tablet may constitute misconduct, it's questionable whether it warrants the severe consequence of debarment, especially considering Mpho never commenced employment with A C Capital and may not have been fully aware of the consequences of his actions.

Section 36 also emphasizes fair procedures when limiting rights. Mpho argued that he never commenced employment with A C Capital and was unaware of the debarment process being undertaken. This raises questions about whether he was given a fair opportunity to defend himself and whether due process was followed in the debarment decision.

Section 36 requires that less restrictive means should be explored before limiting rights. In this case, it could be argued that pursuing criminal charges for the alleged theft of the tablet may have been a less restrictive alternative to debarment, especially considering the circumstances surrounding Mpho's employment status and awareness of the situation.

Considering these points, the debarment decision in this case may fall short of the requirements outlined in Section 36 of the Constitution. It raises concerns about the proportionality of the limitation imposed on Mpho's right to work, the fairness of the procedure followed, and whether less restrictive means were explored before resorting to debarment.

8.4.8 *Poobendren Pillay v Capitec Bank* Ltd FSP 26/2023

8.4.8.1 Facts

This case relate to a matter were an FSP effected debarment on a former employee. It brings a different scenario to analyse, whether an FSP may impose debarment on a representative who is no longer employed by such FSP. Pillay brought the matter to the Tribunal as an Applicant and Capitec Bank became the Respondent on the matter.

Pillay was employed with a division of Capitec Bank in 2019. He resigned on 26 November 2022 and was to serve a one-month notice period. Pillay then joined African Bank on 1 November 2022. During February 2023, Capitec wrote a letter of demand to Pillay alleging that he had breached his duties of confidentiality to Capitec, which conduct amounted to unlawful competition. On 30 March 2023, Capitec advised Pillay of its intentions to debar him terms of section 14(3) of the FAIS Act and ultimately debarred him.

8.4.8.2 Decision of the court

The Tribunal found that Capitec only conducted its investigation into Pillay’s alleged impropriety during December 2022. This was after Pillay had resigned and was no longer a representative of Capitec. On this ground the Tribunal set aside the debarment.

8.4.9 Comment: Debarment in terms of the framework

8.4.9.1 Common Law

The Tribunal found that Capitec initiated its investigation into Pillay's alleged misconduct after he had already resigned from his position and was no longer a representative of the bank. According to the framework, debarment decisions should generally be based on conduct committed during the individual's employment period with the FSP. Investigating and debarring Pillay after he had left Capitec raises questions about the jurisdiction and authority of the bank to take such actions against a former employee.

Since Pillay had resigned from Capitec and joined another financial institution by the time the investigation and debarment process began, the Tribunal may have viewed Capitec's actions as lacking jurisdiction. Debarment decisions typically fall within the responsibility of the FSP with which the representative is currently employed, as they are accountable for ensuring the fitness and propriety of their representatives.

The Tribunal's decision to set aside the debarment implies concerns regarding fairness and due process. Pillay might not have been afforded a fair opportunity to respond to the allegations or present his side of the story before the debarment decision was made. This raises questions about procedural fairness and the adequacy of the investigation conducted by Capitec.

The FAIS Act and related regulations (FSR Act and Guidelines) outline specific procedures and criteria for debarment decisions. Capitec's actions in this case may not have fully aligned with these regulatory requirements, indicating a deviation from established standards for ensuring the fitness and propriety of representatives in the financial services industry. This shows inconsistency and lack of certainty on practical application of debarment.

Overall, the *Pillay vs Capitec Bank* case illustrates deviations from the acceptable framework in terms of timing, jurisdiction, procedural fairness, and consistency with regulatory requirements. Addressing these shortcomings is crucial for maintaining transparency, consistency, and fairness in the debarment process within the financial services sector.

8.4.9.2 S36 of the Constitution

Section 36 requires that any limitation on rights must serve a legitimate aim in a democratic society. While the FSP (Capitec Bank) aimed to address Pillay's alleged breach of duties of confidentiality and unlawful competition, the timing of the investigation and debarment raises questions about the legitimacy of the aim. Since the investigation occurred after Pillay had resigned and was no longer a representative of Capitec Bank, it's unclear whether the aim of protecting the financial services industry or public interests was legitimately served.

The limitation imposed on Pillay's right to work through debarment must be proportional to the importance of the purpose it seeks to achieve. However, the Tribunal found that Capitec Bank conducted its investigation into Pillay's alleged misconduct only after he had resigned, which raises doubts about the proportionality of the debarment decision. If Pillay was no longer representing Capitec Bank when the alleged misconduct occurred, the severity of the debarment as a response might not be proportional to the situation.

Section 36 emphasizes fair procedures when limiting rights. It requires that individuals affected by a limitation have the opportunity to participate in the decision-making process and to defend themselves. In this case, the investigation into Pillay's alleged misconduct took place after he had resigned, potentially depriving him of the opportunity to defend himself adequately. This lack of procedural fairness undermines the legitimacy of the debarment decision.

Section 36 mandates that less restrictive means should be explored before limiting rights. In the context of Pillay's case, Capitec Bank could have considered alternative measures to address the alleged misconduct, such as legal action for breach of confidentiality or unlawful competition. Debarment should be considered as a last resort after exhausting other less restrictive options. However, the decision to debar Pillay without exploring these alternatives suggests a failure to comply with this requirement.

8.5 Conclusion

In conclusion, the cases analyzed shed light on the complex landscape of debarment within the financial services industry under the purview of the FAIS Act. The cases highlight the need for procedural fairness and due process in debarment proceedings. While debarment is a serious consequence with far-reaching implications for individuals' careers and reputations, it must be based on clear evidence and conducted in accordance with legal and regulatory requirements.

9 Administrative law

9.1 Introduction

Administrative rule of law is a section of public law that governs the organization, powers, and actions of the state administration (Baxter, 1979). Administrative law governs administrative action. Administrative action means a decision that is of administrative nature, made in terms of an empowering provision, by an organ of state (or private person exercising public power), that adversely affects rights and that has direct external legal effect (Burns and Beukes, 2006) . This control of private power is needed if it is in private law or specific legislation.

In exercising its powers, a private body must adhere to principles of natural justice. These include informing the affected person of the intent of the body to exercise its powers. If the exercise of power includes conducting a hearing, such hearing must afford the affected person an opportunity to adduce evidence and gainsay allegations against him. The Promotion of Administrative Justice Act No. 3 of 2000 (PAJA) outlines the compliance by organizations that must be adhered to in exercising their powers. The purpose of this Act is to give effect to administrative action that is lawful, reasonable and fair.

Where the exercise of power by private bodies has public law consequences or is exercising public law functions such that its powers interfere with rights of an individual or a group of people, then it may be sufficient to bring that body within the reach of judicial review. For power to be reviewable in terms of the rules of public law, such power ought to be administrative law power which is governmental in nature. Such power may include limitations of a person's right to liberty. Rule of Law also provides that acts relating to public law functions must be authorized by a higher norm, both with respect to the competence of commanding authority and to the content of the order (Hoexter, 2004).

In modern times, when society finds that there is a mischief to be remedied then an agency is created to deal with this mischief. The government in practice functions via administrative bodies including agencies. How these bodies function is the subject matter of administrative law. These agencies are often referred to as quasi-autonomous, nongovernmental organizations (quangos). A quango is "an organization that is established by a government to consider a subject of public importance but is independent from the government"(Bertelli, 2006). These quangos have proliferated in recent years.

That these administrative bodies (quangos) would become a problem is easy to understand if the evolution of the administrative process is understood. Firstly, the bodies would want to issue their own rules for society to obey. Secondly, they would want a process to ensure the rules are obeyed. Thirdly, they would want to take steps against members of society who do not obey their rules. Finally, the bodies would want to ensure that they are adequately funded. They are set about making laws, enforcing laws, prosecuting and adjudicating and imposing taxes to fund themselves, which is the function of the state itself, in short, they become a unitary state within a state. Not surprisingly, it has been pointed out that the administrative process may be unconstitutional and unlawful (Mazzeschi, 2021).

"Quangos," these agencies present a challenge for the theory of delegation because their tasks are often comprised of routine administration, such as the distribution of benefits and the collection of user fees, rather than more politically salient policymaking (Elgie, 2006).

When creating a quango, a legislature, executive, or government agency transfers a portion of its policy implementation power as well as partial authority to determine the way policy is implemented (Elgie, 2006). However, the legislature can also retain or, more precisely, grant some of that authority to a department minister. The mandate of a quango may be as narrow as a single task, or it can be involved in a variety of quasi-legislative and quasi-judicial functions within a specific policy domain. Quangos may be monopoly policymakers in a policy area or may share authority with other quangos and/or traditional bureaus.

One way to frame the quango problem is as one of accountability: Quangos "place public money and government functions in the hands of unelected persons whose links to the elected bodies that supervise government are tenuous at best" (Hirst 1995).

Private bodies are not only subjected to judicial review in exercising their powers in terms administrative law but such powers that have public law functions will also need to be authorized by courts in terms of principle of legality (Cortese, 2023).

Section 33 of the Constitution provides that;

33 (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must –

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration.

Section 33 (3) provides that administrative actions are subject to review by court or by an independent and impartial tribunal. This happens where the affected person alleges unlawfulness, unreasonable and/or procedurally unfairness with regard to how administrative action was conducted.

9.1.1 South African administrative law

The act of limiting protected rights is a public function which may be exercised by an organ of the state (Conte, 2010). However, states may delegate certain public functions to private bodies for various reasons, including efficiency, expertise, and resources management. The state may delegate public functions to private bodies with the aim of improving efficiency and cost-effectiveness (Kireeva, 2015).

Private entities may be able to deliver services more efficiently than government agencies due to their specialized expertise, innovative approaches, or competitive incentives (Elgie, 2006). Private bodies often possess specialized knowledge, skills, and resources that make them well-suited to perform certain public functions. For example, a private company with expertise in information technology may be contracted to manage government IT systems, or a private healthcare provider may be enlisted to deliver medical services in public hospitals.

Privatization can spur innovation and drive improvements in service delivery by introducing competition and incentivizing performance. Private entities may introduce new technologies, methodologies, or management practices that lead to better outcomes for citizens. Private bodies may offer greater flexibility in adapting to changing circumstances or demands compared to government agencies. They can respond quickly to market dynamics, scale operations as needed, and tailor services to meet specific requirements. Delegating public functions to private entities can help alleviate pressure on government budgets and resources. Private investment and financing mechanisms may be leveraged to fund infrastructure projects, public services, or development initiatives without relying solely on taxpayer funding (Williams, 2008).

FAIS Act debarment is effected by an FSP or the regulator, both these are not organ of the state. However, in terms of definition section of PAJA, s1(i)(b) administrative action means any decision taken, or any failure to take a decision, by a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect… Private bodies such as FSPs may have authority to execute administrative actions in terms of PAJA. This section analyses administrative law and whether FAIS Act debarment is line with principles of administrative law (Ospanova *et al.*, 2018).

Administrative law proceedings need follow the principles of natural justice, i.e., audi alteram partem and nemo iudex in causa sua (Wiechers, 1976). Natural justice had to be observed whenever a decision was to be made to take any action that could affect an individual's interests. Debarment is limitation to individual's rights and it is an administrative act. Debarment attracts natural justice and consequently administrative law. Debarment is limitation to right to work. Is this limitation in line with common law as well as s36 limitation to the right to work?

Considering the rule of law, for a representative or key individual to be debarred they ought to have broken a law or committed a crime to be precise, such must be determined before ordinary courts of law. This falls under the principle of legality, which is a branch of the rule of law. The government's power to punish individuals for breach of law is only limited to what is prescribed under the rule of law i.e., a crime committed, due process of law followed and through ordinary courts. Where no crime has been committed, government lacks power to punish any individual for whatever they have committed, same applies in a situation where a crime is committed but no due process has been followed, government lacks power to impose any form of punishment without due process of the law (All, 2004).

Although, debarment is applicable through delegated power of government to private parties i.e., FSP together with the FSB, it is clear from some of the decided cases that there's visible arbitrary power on the part of these private parties when exercising delegated powers. This dissertation analyzes the *Barthram* case, to examine arbitrary power on the part of government.

9.1.1.1.1 Practical case study: Barthram case

Mr Barthram was debarred by his employer, Discovery Ltd, together with the FSB or the Registrar of Financial Services Providers. The results of this debarment are limitation to Mr Barthram's right to liberty, liberty to work. In terms of the rule of law, one would expect that for Mr Barthram to have his liberty limited would have been as a result of him committing a crime, going through the due process of law and in a court proceeding. Discovery Ltd conducted a meeting with Mr Barthram where they furnished him with 'incomplete' documents which they alleged that they were signed by him. Discovery Ltd advised Mr Barthram that the signing of incomplete documents constituted an irregularity and Discovery Ltd will report to the FSB. What followed after this meeting was Mr Barthram being debarred for failure to meet fit and proper requirements as required by the FAIS Act. It is clear that besides the absence of clear and visible crime, there was no due process followed let alone in an established court of law when the decision to debar Mr Barthram was imposed. The absence of arbitrary use of power on the part of government (delegated authority) cannot be established with easy at the very best and cannot be established at all at the worse in the *Barthram* case.

9.1.1.1.2 Every man subject to ordinary law administered by ordinary tribunals.

Does every person across the Financial Services industry who signs incomplete documents get debarred? The most realistic answer is no. Whether FSPs together with the FSB have powers of ordinary tribunals in terms of delegated authority shall be dealt with in a separate chapter. If an employee of a certain insurance company can commit the same 'irregularity' as Mr Barthram but he does not face the same fate as Mr Barthram then it is clear that the law that was applied to Mr Barthram does not apply to each and every person in the very same position as Mr Barthram, that is, if there was a law at all.

9.1.1.1.3 General rules of constitutional law are results of ordinary law of the land.

The security for personal freedom does not depend upon or originate in any general proposition contained in any written document. The right to personal liberty as understood in England means in substance a person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification. This principle has two parts; firstly, it follows that government cannot make a rule that is not lawful such as a rule that conflicts with right to life such as a law calling for a certain group of people to be killed by any means.

The Rule of Law requires governance to be legal regardless of the sovereign of the ruling. The decision to put people to death would still be invalid even if it's a decision passed by majority of the representatives in parliament. Secondly, government rules must govern human conduct. Everyone has a right to liberty according to law and his right is only limited if it interferes with other's fundamental rights. According to Rule of Law, government should rule human conducts in a manner that everyone's fundamental rights are protected under law. This is the essence of limitation of rights which can only be achieved through due process of the law.

Lon Fuller suggested a list of conditions to be met for law to be able to fulfill the function of governing human conduct(Murphy, 2005):

1. Generality
2. Promulgation
3. No retroactive rules
4. Clarity
5. No contradictory rules
6. No impossible prescriptions
7. Stability
8. Consistent application

1. *Generality:* legal prescriptions must be issued at some level of generality. No legal system can function by addressing its prescriptions to individuals, one by one, or by addressing each act separately (Slade, 2017).

This principle allows for law of general application. Rules must also be transparent to allow for interpretation to be general (Muioz, 2016b). When limiting one person's right to work, rules and procedure followed must be general in that they can be applied and followed even in a different case that present the same or similar facts. Under *generality,* one person is not only certain about rules that governs their conduct but also certain about same rules governing other people's conduct. This principle dictates for consistency in the application of rules as well.

Laws that target acts or conducts from a certain group of people cannot be said to be *General.* This dimension of law can be referred to as *particularity of law* and deals with acts relating to particular people.

The debarment provided for in Section (14) of the FAIS Act which applies to representatives of Financial Services Providers, can be interpreted to affect all representatives. However, the problem of generality regarding this rule lies with 13(2)(b), which deals with satisfaction of FSPs with conducts of representatives. Section 13(2)(b) is open for FSPs to set their own standards of what acts of representatives may be satisfactory to them. Under this section, a representative can be debarred for committing a certain act for one FSP, while another representative may be let free for the same act on a different FSP. In this case Section 14 will not have a general effect to all representatives in the industry.

2. *Promulgation*: for law to be able to guide human conduct, it must be promulgated to its subjects. People can only be guided by rules or prescriptions if they know about the existence of the rule or prescription (Du Toit, 2004).

Before a certain Act is made into law in our country, the public gets to be invited to engage on the bill that is to be made into law. These engagements are mostly through invites for written comments or public forums. This is to make awareness of the new rules and also to get an idea on how the public perceive such rules before they can be made into laws. Industry representatives are also invited to have input on laws that affect such industry in any manner, direct or indirect impact.

This awareness continues even after the rule has become a lawful law. In the financial services industry, bodies such as SETAs, sector institutes and industrial journals become agents of awareness in advising on the merit and scope of different rules affecting the industry.

When people are aware of the rules governing their conduct, they also can put measures to avoid contravening those laws. Promulgation helps to avoid a situation where people become aware of a certain law only after contravening such law. If a certain conduct is deemed an offence and has to be regulated or is regulated then the principle of promulgation provides that in order to achieve the objective of rule of law, the industry and affected stakeholders must be made aware of such conduct which is deemed an offence and any law or regulation around it needs to be explicitly stated and become a general knowledge within the industry. When such conduct, any law or regulation governing it, becomes general knowledge then people within the industry are able to channel the acts in a manner which avoids making an offence or contravening rules regulating certain conduct (Du Toit, 2004).

Before a certain Act is made into law in our country, public gets to be invited to engage on the bill that is to be made into law (Gusman and Syofyan, 2023). These engagements are mostly through invites for written comments or public forums. This is to make awareness of the new rules and also to get an idea on how the public perceive such rules before they can be made into laws. Public participation is a critical aspect of the legislative process. When it comes to Acts or regulations such as FAIS an ordinary person without any financial knowledge let alone appreciation of historical developments in the financial industry will not only find these kinds of gathering uninteresting, they will also not contribute much that can shape the Bill which will later be enacted into an Act.

The result is an Act or regulation which can be said to be an outcome of caucus of industry representative. The danger of this is that this Act applies to anyone who is part or becomes part of the industry, including those who may have only developed the knowledge of financial industry after the Act was enacted or after the debates on the contents of the Act were conducted. The problem happens when this caucus drafts an Act that becomes problematic such as FAIS, the judiciary will be left to deal with the mess.

There were some sound arguments raised by bodies such as SETAs, sector institutes and industrial journals as agents of awareness in advising on the merit and scope of different rules affecting the industry. Records from Hansard Parliamentary debates, indicate engagements and debates from major industry players, consumer organizations, governmental institutions, and regulators(Parliament of the Republic of South Africa, 2002). It was raised that, debarment of an employee affects amongst other things, his earning potential, support to his dependents and well as career growth. All these are fundamentals in every social for its potential advancements.

A society that is free to debar any other worker at any time renders the dependents of such worker to destitute. In as much as debates on the FAIS Bill were held with consumer organizations, the driving force behind the FAIS Bill were the industry representatives. For provisions such as Section 14 of the FAIS Act, parliament was supposed to give a considerable opportunity to employees as well ordinary citizens to have their views on this section as it challenges fundamental right to work of citizens who choose to pursue their career in the financial services industry and threatens the living standards of their dependents as well the advancement of the society as a whole.

3. *No retroactive rules*: for the law to be able to guide human conduct, it must prescribe modes of behavior prospectively. Retroactive rules, namely, rules purporting to affect behavior which had already occurred prior to the rule's promulgation, cannot achieve the purpose of actually guiding human conduct (Nortier and Mogale, 2021).

Someone who has committed a certain act, before such act is regarded as misconduct through legislation or any other lawful law, may not be guilty of misconduct provided that such act was committed before the law prohibiting or condemning it became effective (Smith, 2015). Such person may go on with their lives, they will only be brought to the book of law if they commit such act again after it has been lawfully condemned.

There is not any form of act that is regarded as misconduct and punishable in terms of FAIS when it comes to debarment, only dissatisfaction of the FSP and consequently the registrar on the conduct of a representative may lead to debarment.

4. *Clarity*: Rules or prescriptions can only guide human conduct if the subjects understand what the rule requires. Promulgation is not enough (Chidede and Osode, 2019).

The clarity of law provides for legally recognized goals including certainty and predictability clarity of law (Gribnau, 2013). Where there is certainty in law, people are clear of interpretation of such laws as when as its application and they can predict certain consequence actions that may follow from breaking the law or omitting to follow its guidance. The law ought to be clear in its interpretation to avoid ambiguity. It also ought to provide a clear explanation where there's confusion.

When limiting the fundamental right of any person, due process ought to be followed, the process includes a fair hearing in front of an independent judge (Sheuerman, 2009). FAIS Act has no indication of this process for FSPs when effecting debarment. There is lack of a clear path to followed when effecting debarment except for FSP to believe that the conduct or act of an employee has been unsatisfactory. A debarred individual may not be satisfied that his debarment was in line with the required process, as the Act lack clear indication.

5. *No contradictory rules*: For similar reasons, if the rule prescribes one thing and at the same time its contradiction, people cannot follow it. Or, if people are prescribed to do go by one rule and not by another rule, then there is no way in which they are able to follow both. Obedient of a certain rule leads to disobedient of another. In this situation, individuals are left at a confusion of which rule to obey and which not to obey. In a situation where rules are contradicting one another, individuals will choose to obey that which comes with harsh penalties for disobedient. When passing laws, the legislature ought to avoid this dilemma (Rautenbach, 2001).

6. *No impossible prescriptions*: A rule or prescription may be comprehensible and not inconsistent but, in practice, impossible to follow. A rule that people cannot follow is a rule that cannot guide human conduct, even if it is understood perfectly well. Suppose that you order me to fly without any mechanical assistance. Socio-economic challenges may also aid in making certain rules impossible to follow (Galbiati and Garoupa, 2007).

   Debarment as a rule may be practical to follow or acceptable practice in a well-developed economy where a debarred individual stands a chance of making another means of survival through other avenues such as being employed in a different sector or starting up a business or where the company that debars an employee has a chance in finding employing another person with same or better skills and expertise. In an economy where job prospects are low and chances of skilled jobseeker are also low, debarment can prove to be impossible to follow as a rule for an employer and may be met with a greater resistance from employees which also would make it impossible to be applied.

7. *Stability*: It is generally assumed that some level of stability over time is essential for the law to achieve its purposes, whatever they are. A rule that faces continuous resistance from people cannot be a stable rule. People may also intentionally violate such rules as a form of resistance. For courts to make fair and just rulings, the ought to be stability of rules (Press and Journal, 1975).

8. *Consistent application*: for the law to be able to guide human conduct, it must maintain considerable congruence between the rules promulgated and their actual application to specific cases. In other words, the law cannot guide human conduct if actual deviations from it are not treated as such, namely, as deviations from the rule. Rules cannot be applicable only to certain individuals or certain times and consequence of deviation must objective and in line with the rule (Silzer and Considine, 2000).

Where a crime is committed, a punitive measure by the State ought to follow. Such punitive measure may bring about effect to limitation to fundamental rights. Fundamental rights engage the principle of legality. What is crime? According to Burchell & Hunt, crime may be defined as ‘conduct which common or statute law prohibits and expressly or impliedly subjects to a punishment which is remissible by the State alone and which the offender cannot lawfully avoid by his own act once he has been convicted' (Burchell, 1983).

There are three elements in the definition of a crime that I would want to mirror the FAIS Act against in order to establish crime or criminality (Burchell, 1983). These elements are;

Conduct prohibited by common or statute law,

Subject to punishment by the State,

Unavoidable by the offender.

Conduct is punishable if the law says it is punishable (Burchell, 1983). It follows that conduct ought to be prohibited by law for it to be punishable i.e. crime, and only such conduct is unavoidable by the offender. The start point will be establishing conduct in terms of the FAIS Act.

Conduct prohibited by common or statute law

The point of departure will be identifying whether there's any act or conduct which FAIS Act and section 14 in particular refers to, of which such act or conduct is prohibited through common or statutory law. Section 14 deals with debarment, such debarment follows as a consequent of FSP not satisfied in terms of section 13(2) that the representative or key individual is competent to act, in line with section 8(1) which deals with compliance with fit and proper requirements.

Section 8(1) An application for an authorisation referred to in section 7(1). including an application by an applicant not domiciled in the Republic, must be submitted to the registrar in the form and manner determined by the registrar by notice in the Gazette, and be accompanied by information to satisfy the registrar that the applicant complies with the requirements for fit and proper financial services providers or categories of providers, determined by the registrar by notice in the Gazette, after consultation with the Advisory Committee, in respect of-

(a) personal character qualities of honesty and integrity;

(b) the competence and operational ability of the applicant to fulfil the responsibilities imposed by this Act; and

(c) the applicant’s financial soundness:

The Act itself does not prohibit any form of conduct, but only explicitly deals with outcomes or consequences of, i.e. personal character qualities of honesty and integrity, a certain conduct. Theft may lead to one’s failure to possess personal character qualities of honesty and integrity. The very same way, failure to keep record of certain transactions may also lead to one’s failure to possess personal character qualities of honesty and integrity. Theft is a crime as per section 243 of the Criminal Procedure Act 51 of 1977. On the other hand, there’s no law that criminalizes failure to record a transaction. Based solely on this, there’s lack of clarity in FAIS Act on conduct that may lead to one’s failure to posses’ personal character qualities of honesty and integrity.

Although it is not clear on FAIS Act, what type of conduct may affect personal character qualities of honesty and integrity, Barthram case proves that some conducts may include such conduct which is not criminal in nature.

The principle of legality requires that before limitation to a fundamental right is imposed, an existing law protecting fundamental rights ought to have been broken first, to an extent that such limitation will not exist if there’s no law protecting fundamental right (Hoexter, 2004a). There ought to be a crime committed. There are no obvious actions of representative and key individual that can be linked to interfering with other people’s fundamental rights hence no prohibition of conduct, let alone any negative duty placed on them by law to refrain from certain acts in relation to their profession. Section 14(1) does not conform with limitation of fundamental rights and the principle of legality to an extent that it is based on the satisfaction of the employer and not an existing law protecting fundamental rights.

Where a person’s enjoyment of right or freedom conflicts with other people’s fundamental rights the government ought to act to protect fundamental rights. The actions of government may include having to limit the rights of an individual whose enjoyment or freedom conflicts fundamental rights of others. In limiting a person’s rights, the principle of legality is applied (Dibarrart, 2016).

The principle of legality provides that any limitation to fundamental rights of individuals through court judgement or administrative act must be in line with the law that governs people's rights to an extent that such limitation would not be valid if it does not exist in law (Hoexter 2004). These laws must be very clear laws and not retrospective laws.

The most common example where limitation would exist in law is where the exercise of one's right is in interference with other's enjoyment of their rights (Dibarrart, 2016). Where there's existence of interference with other people's rights, the principle of legality provides that fundamental rights may be limited through legal sources i.e., statutes, customs and judgement, or morality and the rights of others (Garibaldi, 1976). These sources are applied on the grounds of public order and general welfare of society.

9.2 Administrative roles in terms of FAIS Act

9.2.1 FSP

A licensed financial institution that becomes aware that a debarment order has been made in respect of a natural person employed or engaged by the financial institution must take all reasonable steps to ensure that the debarment order is given effect to.

A debarment decision by an FSP constitutes the exercise of a statutory power and amounts to administrative action (*PW Basson v Associated Portfolio Solutions (Pty) Ltd and Others* [WC – Case No. 16224/2017] and *Odendaal v ABSA Brokers* (Pty) Ltd and another [2015] JOL 34944 (FB).

According to the Guidance note, a debarment must relate to –

a. the non-compliance by a representative or a key individual of such representative with the fit and proper of the FAIS Act; or

b. contravention or failure to comply by a representative or a key individual of such representative with a provision of the FAIS Act, in a material manner.

Section 14(3) of the FAIS Act sets out the requirements with which an FSP must comply when debarring a person. These requirements must be contained in an FSP's policies and procedures governing its debarment process. In other words, you are obliged to have a documented debarment process which you must follow when effecting such an action.

Prior to the debarment hearing you should:

a. Give adequate notice in writing

b. Consider any response from the person involved

c. Decide to debar, or not, inform the person in writing, advise them of their rights to request reasons for the decision and have the decision reconsidered by the Tribunal.

Step 1: Give adequate notice in writing to the accused:

- The notice should state:
  - The FSP's intention to debar the accused;
  - The grounds and reasons for the debarment. Grounds refer to the non-compliance by a representative or key individual of such representative with the fit and proper requirements as postulated by s13(2)(a) of the FAIS Act; or a contravention or failure to comply by a representative or a key individual of such representative with a provision of the FAIS Act, in a material manner. Reasons mean the facts that inform these grounds; and
  - Any terms attached to the debarment, including, in relation to unconcluded business, any measures stipulated for the protection of the interests of clients;
- The FSP should, through the notice, provide the person with a copy of its written policies and procedures governing the debarment process;
- The FSP should, through the notice, provide the person with a copy of its written policies and procedures governing the debarment process;
- The FSP should further, through the notice, give the person a reasonable opportunity to make a submission in response.

What constitutes “adequate notice” and “reasonable opportunity” will depend on the circumstances of each case. For example, when there are reasonable grounds to believe that substantial prejudice to clients or the general public may occur, this may warrant that debarment proceedings are carried out on an urgent basis. The 2019 Guideline notice noted that representatives approach the Authority, after the debarment, to request the documentation and reasons for the debarment by the FSP from the Authority. In this regard, the Authority urges the FSP to also provide a representative with the documentation that informed the decision to debar the representative when it gives the represebtative notice of its intention to debar the representative. This will also enable the representative to formulate a proper response.

Step 2: Consider

Any response received from the person that the FSP intends to debar, and have regard to information regarding the conduct of the person that is furnished by the Authority, the Ombud or any other interested person.

Step 3: Take a decision

Whether or not to debar the person and immediately notify the person in writing of,

- The FSP’s decision;
- The persons’ rights in terms of s228 of the FSR Act, i.e. the right to-
    1. Request reasons of the decision; and
    2. Have the decision reconsidered by the Tribunal.

The Guidance Notice also provides clarity on the issue of what to do when you discover a transgression after the person had resigned. This has proven to be a contentious matter and needs to be revisited in the Guidance Notice should such a situation arise (Kruger, 2021)

The November 2013 Guideline on the debarment process in terms of s14(1) provides that provides that if a provider had no mandate or contractual relationship with a representative at the time when the reason for the debarment occurred, it cannot effect a valid debarment. If, however, the reason for the debarment existed, but only came to the notice of the provider later, the process of debarment may still be embarked upon. The register requires providers to show that they have authority to debar representatives, either by virtue of an employment contract or mandate agreement which existed at the time the reason for the debarment occurred. The person who authorizes the debarment of the representative must be the key individual of the provider or such other person duly authorized by the provider.

The 2013 Guideline also cautions providers to use their power without bias and to have the decision on debarment taken by independent and impartial person. This Guideline also provides that where the provider might be perceived as biased, it is recommended that an independent person be delegated to chair the enquiry to determine whether there are grounds for debarment.

This guideline elaborates on the idea that debarment would not be appropriate before due process has been completed. Debarment should be done within the framework of the law. Providers must ensure that the debarment is rational and reasonable.

The 2013 guideline got repealed by 2019 guidelines which aims to serve the same purpose with greater clarity. The 2019 guideline emphasizes that if the reason for debarment occurred or only became known after a representative had ceased to be a representative of the FSP, the FSP may not debar the representative and must refer the matter to the Authority.

9.2.2 The Regulator

The Authority does not review, approve or confirm a debarment of a representative. The administrative action is complete once the debarring FSP takes a decision.

On receipt of the Notification Form, the Authority:

a. may consider the possible referral of the representative’s actions for criminal investigation or enforcement action as contemplated by section 167 of the FSR Act
b. has access to the relevant information should it receive an application for reappointment of a debarred representative and

c. can satisfy itself that due process was followed by the FSP and that the debarment complies with provisions of the FAIS Act. In the absence of this, possible regulatory action against the FSP may follow.

In terms of Section 153 of the FSR Act, the responsible Authority for a financial sector law may make a debarment order in respect of a natural person if the person has:

- Contravened a financial sector law in a material way;
- Contravened in a material way an enforceable undertaking that was accepted by the responsible authority in terms of Section 151(1).
- Attempted, conspired with aided, abetted, induced, incited or procured another person to contravene a financial sector law in a material way; or
- Contravened in a material way a law of a foreign country that corresponds to a financial sector law.

9.2.3 Registrar and deputy registrar of financial services providers

The executive officer and deputy executive officer of the Board are respectively the registrar and deputy registrar of financial services providers and have the powers and duties provided for by or under this Act or any other law.

Special provisions concerning powers of registrar.

If there is reason to believe that a person is contravening or failing to comply with or has contravened or failed to comply with, a provision of this Act. the registrar may-

(a) by notice direct that person-

(i) to furnish the registrar within a specified period with any specified information or documents in the possession or under the control of that person and which relate to the subject-matter of such contravention or failure;

(ii) to appear before the registrar at a specified time and place for the purpose of discussing such matter with the registrar; or

(iii) to make arrangements forth e discharge of all or any part of that person's obligations in terms of this Act;

(b) if satisfied that in the case concerned significant prejudice or damage to clients has occurred or may occur, apply to a Court for an order restraining such person from continuing business or dealing with the funds or other property held by such person on behalf of clients or other persons, pending the institution by the registrar of an application or action contemplated in section 33 (1) and (2), or the exercising by the registrar of such other legal remedy as may be available to the registrar;

(c) if prejudice or damage may have occurred to a client, refer the matter, together with any information or documentation in the registrar's possession, to the Office to be dealt with as a complaint by the client concerned.

9.2.4 Office of Ombud for Financial Services Providers

21. (1) The Board, after consultation with the Advisory Committee-

(a) must appoint as Ombud a person qualified in law and who possesses adequate knowledge of the rendering of financial services;

This Ombud is created to consider and dispose of complaints in a manner described in the act as 'procedurally fair, informal, economical and expeditious.' Fairness as the Act puts it, would require the complainant being afforded an opportunity to have an independent hearing. Put a scenario where a complainant is a Representative who believes he was debarred unfairly in terms of Section 14 by the registrar. FAIS Act will not provide fairness in addressing the case of the complainant in that his method of recourse according to the Act would be approaching the Ombud, this Ombud is not independent in that it is appointed by the Board and depend on the Board for its functionality. Section 21 (4) puts it clearly that the Ombud functions at the mercy of the Board;

(4) The Board may on good cause shown, after consultation with the Advisory Committee, remove the Ombud or a deputy ombud from office on the ground of misbehaviour, incapacity or incompetence, after affording the person concerned a reasonable opportunity to be heard.

The Ombud is also dependent on the Board for financial support;

22. (1) The funds of the Office consist of-

(a) funds provided by the Board on the basis of a budget submitted by the Ombud to the Board and approved by the latter;

An institution that depends on another institution for its functionality as well as financial support can not be said to be independent from the institution it depends upon.

FAIS Act also impose penalties to those who fail to comply. Section 36 provides that;

Any person who-

(a) contravenes or fails to comply with a provision of section 7(1). 8(8), 13(1). 14(1), 18, 19(2) or 34(4) or (6): or

(b) in any application in terms of this Act, deliberately makes a misleading, false or deceptive statement, or conceals any material fact, is guilty of an offence and is on conviction liable toa fine not exceeding R1 000 000 or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.

Private bodies ought to adhere to principles of legality and Rule of Law in exercising their delegated powers. These powers and the review of exercising these powers is governed by administrative rule of law. Administrative rule of law is a section of public law that governs the organization, powers, and actions of the state administration (Baxter 1979) . This control of private power is needed if it is in private law or specific legislation.

In exercising its powers, a private body must adhere to principles of natural justice. These includes informing the affected person of the intent of the body to exercise its powers. If the exercise of power includes conducting a hearing, such hearing must afford the affected person an opportunity to adduce evidence and gainsay allegations against him. This will allow the administrative process to meet the requirements of due process of law and subsequently be in line with principles of Rule of Law. The

Promotion of Administrative Justice Act, Act 3 of 2000, outlines the compliance that private bodies must adhere to in exercising their powers.

The examination of administrative law principles within the context of debarment under the FAIS Act sheds light on the importance of procedural fairness, accountability, and legality in administrative actions. Administrative law serves as a crucial framework for regulating the exercise of public functions, whether by governmental bodies or private entities delegated with authority (Ospanova et al., 2018).

The delegation of public functions to private entities can lead to increased efficiency, expertise, innovation, and resource management (Ambrus, Baranovskyi and Kolb, 2021). However, such delegation must be accompanied by robust safeguards to ensure that individual rights are protected and that decisions are made in accordance with the rule of law.

The principles of administrative law, including natural justice, legality, and proportionality, must be upheld in the debarment process. This requires that individuals subject to debarment are afforded the opportunity to be heard, that decisions are made impartially and based on clear legal grounds, and that limitations on rights are justified and proportionate.

Practical cases, such as the Barthram case, underscore the importance of adherence to administrative law principles in the debarment process. Instances of arbitrary exercise of delegated powers by private entities raise concerns about due process and the legality of decisions, emphasizing the need for transparency and accountability.

By applying administrative law principles, administrative authorities can ensure that limitations on rights, such as the right to work, are consistent with constitutional requirements and the rule of law. This helps to safeguard individual freedoms, uphold the integrity of the administrative process, and promote public trust and confidence.

In essence, administrative law provides a framework for promoting fairness, accountability, and legality in administrative actions, including debarment under the FAIS Act. By adhering to these principles, administrative authorities can mitigate the risk of abuse of power and ensure that decisions are made in the public interest and in accordance with constitutional values.

9.2.5 Comment: Debarment in terms of the acceptable framework

9.2.5.1 Common law

The delegation of public functions to private bodies raises concerns about accountability, transparency, and the potential for abuse of power (Bamberger, 2006). Private entities may lack the same level of oversight and accountability mechanisms as public institutions, which can undermine the fairness and legitimacy of administrative actions.

Administrative practice highlights potential shortcomings in the application of principles of natural justice, such as the right to be heard and the requirement for impartial decision-making (Morrison-Saunders and Early, 2008). Individuals facing debarment should have the opportunity to present their case, challenge allegations against them, and receive a fair and impartial decision. However, debarment practice suggests instances where due process may not have been adequately observed, leading to concerns about arbitrary decision-making and lack of procedural fairness.

Debarment in terms of administrative law may lack clarity regarding the criteria and procedures for debarment, leading to uncertainty about the conduct that warrants such action. Clear and specific legal provisions are essential to ensure that individuals understand their rights and obligations and can effectively challenge adverse decisions (Pugh et al., 2022). However, the absence of clear guidelines for determining prohibited conduct raises questions about the legality and fairness of debarment decisions.

Administrative actions should be applied consistently and fairly to ensure equality before the law (Galbiati and Garoupa, 2007). However, there is potential inconsistencies in debarment decisions, with similar conduct not always resulting in the same outcome. This lack of consistency undermines the rule of law and erodes public trust in the regulatory framework.

Debarment should adhere to constitutional principles, including the protection of fundamental rights and the rule of law. However, concerns about arbitrary exercise of power, lack of due process, and inconsistency in decision-making suggest potential violations of constitutional rights and principles. Compliance with constitutional standards is essential to ensuring fairness, accountability, and legitimacy in the regulatory process (Scott, 2001).

Due process requires that individuals be given notice of any adverse actions against them and an opportunity to respond (Sheuerman, 2009). In the context of debarment, individuals must be informed of the intent to debar them and provided with specific grounds for the proposed debarment. Statutory debarment suggests that there have been instances where representatives were not adequately informed or given the opportunity to present their case, thus falling short of due process requirements.

Due process mandates impartial decision-making, ensuring that decisions are based on the merits of the case rather than personal biases or interests (Sheuerman, 2009). While administrative bodies may exercise powers related to debarment, it is difficult to establish impartiality throughout the process of statutory debarment. Administrative practice raises concerns about arbitrary exercise of power by private bodies, indicating a potential lack of impartiality in decision-making.

Due process requires that actions be authorized by a higher norm, both in terms of the competence of the commanding authority and the content of the order (Chidede and Osode, 2019). Due process includes mechanisms for accountability and judicial review to ensure that administrative actions are lawful, reasonable, and fair. Administrative practice suggests that there may be challenges in holding private bodies accountable for their actions, particularly due to their quasi-governmental nature and potential lack of oversight.

Due process serves to protect the rights of individuals facing adverse actions, such as debarment. It ensures that individuals are afforded certain rights and protections throughout the process.

Administrative practice indicates potential infringements upon individual rights, particularly regarding the arbitrary exercise of power and lack of procedural fairness.

9.2.5.2 Section 36 of the Constitution

The case study of Barthram which was analyzed to examine how debarment and administrative law is practiced illustrates concerns about the arbitrary exercise of power by private entities, such as employers and regulatory bodies, in debarment decisions. The lack of clear evidence of wrongdoing or adherence to due process raises questions about the fairness and legality of administrative actions. This arbitrary exercise of power may conflict with constitutional principles of procedural fairness and the right to be heard, as enshrined in Section 33 of the Constitution.

In the Barthram case, the debarment decision appears to lack adequate legal justification, as there is no clear evidence of a breach of the law or due process. This raises concerns about the legitimacy of administrative actions and their compliance with constitutional requirements. Administrative decisions that lack a clear legal basis may be vulnerable to challenge under the Constitution, particularly in relation to the right to administrative action that is lawful, reasonable, and procedurally fair, as outlined in Section 33(1) of the Constitution.

The proliferation of quangos and the delegation of public functions to private bodies raise concerns about accountability and oversight. These entities may operate with limited transparency and scrutiny, potentially leading to abuses of power or violations of constitutional rights. The lack of effective mechanisms for accountability and oversight may undermine the constitutional principle of responsive, accountable, and transparent governance, as articulated in Section 195 of the Constitution.

Individuals affected by administrative actions, such as debarment, may face challenges in accessing effective legal remedies. This may be due to procedural barriers, lack of legal assistance, or limited recourse against private entities exercising public power. Inadequate legal remedies may infringe upon individuals' rights to access justice and seek redress for violations of their constitutional rights, as guaranteed by Section 34 of the Constitution.

Administrative practice highlights concern about the arbitrary use of power and lack of adherence to rule of law principles in administrative practices. The absence of clear legal standards, procedural fairness, and accountability mechanisms may undermine the rule of law and erode public confidence in the legitimacy of administrative governance. This failure to uphold rule of law principles may violate the constitutional imperative of governance that is based on the rule of law, as mandated by Section 1(c) of the Constitution.

10 Conclusion

This dissertation has examined the concept of debarment within the context of the Financial Advisory and Intermediary Services (FAIS) Act 37 of 2002, aiming to establish a framework for lawful debarment and evaluate the alignment of FAIS debarment processes with this framework.

The dissertation began by delineating the limited circumstances under which the right to work can legitimately be restricted through debarment. Through an analysis of legal principles, constitutional rights, and administrative law standards, it was established that debarment must be grounded in clear, specific criteria and must adhere to principles of procedural fairness and transparency. The principle of legality, demanding well-defined grounds for debarment, and the necessity of due process emerged as central pillars of the acceptable framework for debarment.

Subsequently, the dissertation evaluated the debarment procedures outlined in the FAIS Act. While the original Section 14 lacked clarity and procedural safeguards, subsequent revisions introduced some improvements. However, ambiguities persisted, particularly regarding the criteria for determining an individual's "fit and proper" status. The involvement of employers/FSPs in the debarment process raised concerns about procedural fairness, compromising the independence required for fair adjudication.

The analysis also considered the compatibility of FAIS debarment processes with constitutional protections, particularly the right to work enshrined in Section 22 of the South African Constitution. It was found that the broad and ill-defined criteria of FAIS debarment likely fail the reasonableness and justifiability tests mandated by Section 36 of the Constitution, indicating a need for critical reassessment and reform.

In light of these findings, the dissertation concludes that the current debarment system under the FAIS Act does not fully adhere to the acceptable framework for acceptable debarment. Reform efforts should focus on enhancing transparency, specificity, and procedural fairness within the debarment process to ensure alignment with constitutional principles and protection of fundamental rights.

Ultimately, this dissertation contributes to the development of a balanced regulatory framework within the financial services sector, promoting effectiveness, equity, and constitutional adherence in debarment processes. By addressing deficiencies identified in the FAIS Act, policymakers and stakeholders can work towards a system that upholds the principles of fairness, transparency, and constitutional protections, safeguarding the rights of individuals while maintaining robust regulatory oversight.

This dissertation has highlighted several key issues. The analysis of Mr. Pieter Willem Basson's case demonstrated that despite some procedural steps being followed, the lack of a meaningful opportunity for defense and the absence of an independent inquiry compromised the fairness of the debarment process. Ensuring procedural fairness requires that individuals have a genuine chance to present their case, which was evidently lacking.

The principle of legality and the stipulations of the FAIS Act necessitate a separate debarment inquiry to ensure that the process is fair and justified. The failure to conduct a separate inquiry in Mr. Basson's case underscored the procedural deficiencies and highlighted the need for a distinct debarment process.

The debarment process must meet the constitutional requirements for limiting the right to work, as outlined in Section 36 of the Constitution. The lack of a comprehensive inquiry precluded a proper assessment of whether debarment was the least restrictive means to achieve regulatory objectives, raising questions about the proportionality and necessity of the action.

The inconsistent application of debarment measures across different sectors undermines the legitimacy and effectiveness of debarment actions. Establishing standardized procedures and clear guidelines is imperative to ensure fairness and consistency.

This dissertation found that the FAIS Act failed to live to its objective. However, it is not the concern of this dissertation about mis-selling or the objective of FAIS Act. This dissertation found that debarment limits representatives from practicing within the financial services industry. This industry wide limitation to practice was introduced by the FAIS Act. This research found that common provides that any limitation to the right to work must follow the due process of the law. One of many problems with FAIS Act debarment is that s14 does not provide for any due process to be followed when debarring an individual. In practice, due process is not followed by both FSPs and regulators when debarring an individual.

Furthermore, this dissertation has highlighted the severe and irreversible nature of debarment, likening it to a form of capital punishment within the financial industry. This characterization emphasizes the need for careful consideration of the implications of debarment on individuals' livelihoods and rights.

The dissertation aimed to establish an acceptable framework for the lawful debarment of individuals and to evaluate whether the debarment process outlined in the Financial Advisory and Intermediary Services (FAIS) Act aligns with this framework. The dissertation sought to answer two primary questions:

What is the acceptable framework for legitimately debarring an individual, and what are the limited circumstances under which the right to work can be restricted through debarment?

Does the debarment process outlined in the FAIS Act adhere to this framework?

Through an extensive review of legal principles, constitutional rights, and administrative law, the dissertation established a framework that ensures debarment processes are fair, transparent, and legally sound.

The dissertation concludes that the current FAIS Act debarment procedures do not fully align with the established framework for lawful debarment. Implementing the recommended changes can create a more robust, fair, and accountable debarment system, balancing regulatory integrity with the protection of constitutional rights. This dissertation contributes to developing effective and equitable regulatory mechanisms while safeguarding individuals' right to work, providing a foundation for future empirical studies on debarment practices and their socio-economic impacts.

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