

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Ex Parte: THE CONSTITUTIONAL ASSEMBLY

THE APPLICATION BY THE CONSTITUTIONAL ASSEMBLY TO CERTIFY A NEW CONSTITUTIONAL TEXT IN TERMS OF SECTION 71 OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1993

NOTICE BY THE GAUTENG ASSOCIATION OF CHAMBERS OF COMMERCE AND INDUSTRY IN TERMS OF RULE 15(3) AND DIRECTION 4 OF THE DIRECTIONS ISSUED BY THE PRESIDENT OF THE CONSTITUTIONAL COURT ON 13 MAY 1996 AS AMENDED BY THE PRESIDENT'S NOTICE OF 19 MAY 1996

TAKE NOTICE THAT the GAUTENG ASSOCIATION OF CHAMBERS OF COMMERCE AND INDUSTRY objects to the certification of the constitutional text adopted by the Constitutional Assembly on 8 May 1996 ('the text') on the following grounds:

1. Horizontal Application of the Bill of Rights

- 1.1 Section 8(2) of the text provides for the horizontal application of the bill of rights. Horizontal application of rights is not 'universally accepted', however, and hence contradicts Constitutional Principle II which requires this by implication. It also contradicts Constitutional Principle IV, requiring the constitution to bind 'all organs of state' and not private persons as well.
- 1.2 Horizontality unsettles many existing rights and remedies and generates a legal ambiguity and uncertainty which conflicts with Constitutional Principle II, requiring that the fundamental rights in the bill be 'provided for by... justiciable provisions'.
- 1.3 Where a right applies horizontally, it generates a new constitutional cause of action which is not governed by existing law. In deciding on rights which apply horizontally, the courts must thus make rather than apply the law. This conflicts with Constitutional Principle VI, requiring a 'separation of powers' between the legislature and judiciary.

2. The right to property

- 2.1 The right to hold and enjoy property is a fundamental liberty which is 'universally accepted' in almost all international human rights' covenants and national bills of rights. Its inclusion in the bill of rights in a way that gives content and substance to the right is therefore required in terms of Constitutional Principle II, which states that 'everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties'.
- 2.2 It is also generally accepted that the right to property is not absolute and that property can be expropriated in limited circumstances and subject to the prompt payment of fair

compensation. Section 25 of the text, however, deviates from these universally accepted principles by incorporating provisions for derogation which deprive the right of all substantive content. This conflicts with Constitutional Principle II, which entitles everyone to 'enjoy' the benefit of 'universally accepted' freedoms.

3. Socio-Economic Rights

- 3.1 Sections 26 and 27 of the text provide that everyone has 'the right to have access' to specified socio-economic benefits, including adequate housing and health care. Section 28(1)(c) confers on every child the right to 'basic nutrition, shelter, basic health care services, and social services'. These sections introduce into the text rights which are not 'justiciable' and which therefore contradict Constitutional Principle II.
- 3.2 These rights also require the courts to make decisions on matters, such as the raising and allocation of revenue, which belong to the executive. They thus also contradict Constitutional Principle VI, requiring a 'separation of powers' between the executive and the judiciary.

4. The independence of the Reserve Bank

- 4.1 Sections 223, 24 and 225 of the text, providing for the powers and functions of the Reserve Bank, fail to incorporate a politically independent mechanism for the appointment or dismissal of the governor and board of the Reserve Bank. This omission contravenes Constitutional Principle XXIX, which requires that 'the independence and impartiality of a Reserve Bank shall be provided for and safeguarded by the Constitution'.

5. Collective bargaining rights

- 5.1 Section 23 of the text recognises the right of employees to strike but does not accord employers an equivalent right to lock out striking workers. This omission contravenes Constitutional Principle XXVIII, which requires that 'the right of employers and employees to engage in collective bargaining shall be recognised and protected'. According employees the right to strike without according employers the countervailing right to lock out infringes this principle.

6. Appointment of lay people to courts

- 6.1 Section 180(c) states that 'national legislation may provide for the participation of people other than judicial officers in court decisions'. It omits, however, any limitation on the extent of participation permissible, and leaves open the possibility that people untrained in law may be given the power to rule on questions of law as well as fact. In addition, no provision has been made to ensure that such lay people are sufficiently qualified and independent as not to undermine the impartial administration of justice. Both omissions contradict Constitutional Principle VII which requires that the 'judiciary shall be

appropriately qualified, independent and impartial' and which is intended to secure the proper administration of justice in the country.

GAUTENG ASSOCIATION OF CHAMBERS OF COMMERCE AND INDUSTRY

SOUTH AFRICAN GUNOWNERS ASSOCIATION

Weltevreden Park

30 May 1996

CERTIFICATION OF THE NEW CONSTITUTION

On behalf of our members and other people who value their lives and security, wish to object to the certification of the new Constitution on the grounds set out below:

Objection

The new Constitution totally omits any reference to, or provision for, the right to self-defence or to the means thereof. By 'means' we refer particularly to licensed firearms, but also to any other appropriate weapon.

Grounds for Objection

If the Constitution is not to be mere empty words, then its provisions must be able to be implemented and protected. The new Constitution, as placed before you, provides for the right to life and to the right to freedom and security of the person. In the event that most of the other provisions of the Bill of Rights are violated or ignored, restitution can be sought in the courts. However, if one's life is taken by a criminal, or if one is assaulted or raped, then there is nothing the courts can do to reverse the act nor to make adequate restitution.

Despite numerous submissions from SAGA, its members and other members of the public, and despite the fact that the European Convention on Human Rights recognises the right to use force in self-defence, the Constitutional Assembly has deliberately ignored this issue in writing the 'new Constitution. For completeness we quote below the relevant portion of the European Convention.

1. Everyone's right to life shall be protected by the law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction for a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is not more than absolutely necessary.

- a. in defence of any person from unlawful violence
- b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained.
- c. in action lawfully taken for the purpose of quelling a riot or insurrection.

The new Constitution does not in practice therefore protect the right to life and to the right to freedom and security of the person who is the victim of criminal attack. Indeed, by failing to explicitly give the right to self-defence whilst protecting the criminal's right to life, the new Constitution can be said to be protecting those who do not respect the law or the Constitution itself. This is hardly equality of treatment.

Constitutional Principles Not Complied With

Our contention then is that, in failing to address the right to self-defence and the right, in extremis, to use lethal force in defence of life, the new Constitution fails to comply with the Constitutional Principles laid down in Schedule 4 of the Interim Constitution. Specifically that the Bill of Rights does not in reality protect the right to Equality, Life, and Freedom and Security of Person.

Conclusion

Even without the appalling level of violent crime in our country, the fundamental right to self-defence must be included in the Constitution of any State that has the interests of its people at heart. Given that we live in the most violent society on earth it is incomprehensible that the constitutional Assembly could have produced such a flawed document.

We urge you to refuse certification until they have corrected this deadly serious omission.

PETER J SMITH
for Gauteng Committee

30th May, 1996.

TO: The Constitutional Court.

The constitution has to be democratic.

Pure proportional representation ensures that the leadership of the majority party has absolute power to make any law it pleases. Parliament is used to give legitimacy to legislation. Debate in parliament is a mere charade. It ensures unaccountability as the citizens have no power to lobby any particular member of parliament as there is no one directly accountable to the citizens. Democracy requires direct accountability to the citizens.

In a democracy the citizens are and must be sovereign. No provision has been made for the citizens to exercise their sovereignty. There are numerous examples of legislation which is contrary to the will of the majority of the citizens. In a democracy government is elected to represent not rule the citizens. Citizens do not have the right to call and hold referenda as is the case in Switzerland and in many states of America or the right to a trial by a jury of their peers. Only by these mechanisms is sovereignty ensured.

Separation of powers.

For there to be separation of powers of the legislature, executive and judiciary it is essential that each body be either elected or appointed separately. A good example would be the constitution of the state of California or even the U.S. constitution itself. For the legislature to appoint the executive and the judiciary is no different to a defendant in trial appointing the judge. Real independence of the judiciary requires trial by jury.

Exclusive powers to the provinces.

The central government has absolute power over the provinces so there is no provision for real local autonomy. As an example of real local autonomy refer to the Tenth Amendment of the United States constitution.

A.Hoffenberg. MB.BCH. DA.FFA.

HUMAN LIFE INTERNATIONAL

Milnerton
30 May 1996

OBJECTION TO THE CERTIFICATION OF THE NEW CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA BY THE CONSTITUTIONAL COURT

1, Margaret Evelyn Leeson, in my capacity as Secretary of South African Branch of Human Life International do hereby object to the certification of the New Constitution of the Republic of South Africa, by the Constitutional Court on the following counts:

1. I object to the inclusion of parts of paragraph 12 of the New Constitution, as the paragraph conflicts with certain of the 34 constitutional principles contained in Schedule 4 of the Interim Constitution. The said paragraph 12 states, inter alia, that: "Everyone has the right..... to make decisions regarding reproduction and control over their body". This paragraph thus appears to effectively give all women unlimited discretion to terminate their

pregnancies and thereby end the lives of their unborn children. In so doing this paragraph conflicts with the following of the Constitutional principles:

- 1.1 Principle I states, inter alia, that: "The Constitution of South Africa shall provide..... a Democratic system of Government!" The above-mentioned unlimited discretion will permit the arbitrary termination of the lives of unborn children by their mothers, something totally undemocratic, as this cannot happen to children once they are born or indeed to any other citizens. The event of birth is merely a change in environment for the child, from one of containment within the womb to one outside of the womb. The humanity and worth of the child is unchanged by the event of birth. Furthermore all tests of the public opinion in South Africa, on the issue of abortion have shown a very significant and persisting rejection abortion.
- 1.2 Principle II states, inter alia, that: "Everyone shall enjoy all universally accepted fundamental rights'. Of these, the most fundamental is the right to life, for without this right all other rights are totally meaningless. All human rights depend on the existence of life. The above mentioned unlimited discretion will result in the denial of this most fundamental and prime right to unborn children.
- 1.3 Principle III states, inter alia, that: "The Constitution shall prohibit racial, gender and all other forms of discrimination". The above mentioned unlimited discretion will permit and result in fatal discrimination against unborn children for the reasons stated in paragraph 1.1 above.
- 1.4 Principle V states, inter alia, that "The legal system shall ensure the equality of all before the law". The above mentioned unlimited discretion will result in the inequality of unborn children before the law for the reasons stated in paragraph 1.1 above.
2. I object the following omissions front the New Constitution because the said omissions cause Paragraph 12 of the said Constitution to conflict with Constitutional Principles I, II, III and V as stated above, i.e.:
 - 2.1 The words "from conception" have been omitted at the end of paragraph II of the New Constitution, which states that "Everyone has the right to life"!
 - 2.2 The following sub-paragraph has been omitted at the end of the said Paragraph 12:
 - (3) Nothing contained in this paragraph or elsewhere this Constitution shall permit the relaxation of the abortion laws of the Republic of South Africa".
3. I submit in support of my objections that the unborn child is a human being from the time of conception, which event scientifically marks the beginning of the life of every human being, and is entitled to full legal personality and full legal protection from this time.

4. In terms of Constitutional Principle II of the interim Constitution everyone shall enjoy all the universally accepted human rights which shall be provided for and protected by the Constitution.
5. The New Constitution adopted on 8 May 1996 by the Constitutional Assembly does not directly provide for a right protection of family and marriage.

This right is indeed universally protected as evidenced by inter alia the following:

- a) Section 12 of the Universal Declaration of Rights of the UN (1948).
- b) Article 10 of the International Covenant on Economic, Social and Cultural Rights (1966)
- c) Article 23(1) of the International Covenant on Civil and Political Rights (1966)
- d) Articles 8(1) and 12 of the European Convention on Human Rights (1950)
- e) Article 5(d)(iv) of the International Covenant on the Elimination of All Forms of Racial Discrimination (1965)
- f) Part I(16) of the European Social Charter (1961)
- g) Article 18 of the Banjul Charter on Human and People's Rights (1981) (The African Charter of Human Rights)
- h) Article 6 of the German Basic Law (1949)
- i) Article 41 of the Irish Constitution (1937)

M E LEESON

Secretary to Human Life International (South Africa)