

## Submission to the Constitutional Court

### **Unfair discrimination against non-theists in the Preamble and the Oaths of office**

#### Submission

It is hereby submitted that the second and third Constitutional Principles forbid discrimination on grounds of belief, including the belief that there is no God; that there are no valid grounds for holding that discrimination against non-theists is a form of "fair" discrimination; that the words "May God protect our people" (etc.) in the Preamble and the exclusively theistic wording of the Oaths of Office in Schedule 2 involve discrimination against nontheistic South Africans; that these theistic expressions are therefore in conflict with the relevant Constitutional Principles; and that they cannot be certified as acceptable by the Constitutional Court unless they are suitably augmented by words which express the same sentiments in a non-theistic way, for example, "May our country be safe from harm", or are removed. The addition of a similar set of words after the opening words of the National Anthem in various languages would have the same effect there, and similarly will. the Oaths of Office.

#### **Supportive argument**

1. The third Constitutional Principle states that "The Constitution shall prohibit racial, gender and all other forms of discrimination.... (Emphasis added.) The most reasonable interpretation of these words is that discrimination on grounds of belief, including non-theistic belief, is prohibited.

2. Reasons:

2.1 The first three Constitutional Principles convey a basic intention to respect human dignity. This entails recognition of belief because belief is an inherent part of being human.

2.2 In a plural culture like ours, some people believe in a Deity others do not. There being no agreed, objective way of adjudication these differences, all must be free to believe as they choose. Therefore, prohibiting discrimination on grounds of belief cannot apply only to believers in a Deity.

2.3 Confirmation of this contention comes from the second Constitutional Principle, stating that "Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties." No civilised country excludes non-theists from recognition and equality.

2.4 In addition, the Bill of Rights, based on these Constitutional Principles, specifies in Articles 9 and 18 that equality and freedom shall include not just religion but also belief. What is the point of including both these words if not to convey that nonreligious people, and hence secular non-theists, must also be protected from discrimination?

2.5 The remaining Constitutional Principles contain no provision about belief which override the meaning of the ones just considered.

3. I therefore respectfully submit that the Constitutional Principles in question, especially the third, require a Constitution which prohibits discrimination against believers of all kinds, theists and non-theists alike.

4. The question now is whether the Preamble involves discrimination) in connection with the words "May God protect our people" (etc.) . '. submit that it does indeed discriminate unfairly against nontheistic South Africans in this respect, for the following reason;

4. 1 The words "May God protect our people" are an expression of theistic belief. Non-theists hold that there is no such being. Therefore, the theistic expressions in the Preamble give our theists recognition which is not given to our non-theists. That discrimination.

4.2 It might be argued that the above-mentioned words do not really involve discrimination, because everybody allegedly has a God, namely whatever they regard as the ultimate reality, including the material universe. If this view is upheld, then my submission would be that those words in fact discriminate against our theist!; by voiding their central symbol of significant content. I myself emphatically reject the suggestion that the word "God" can mean any object of belief, so that a materialist atheist is also really a theist.

4.3 Nor is it valid to say that those theistic expressions are not unfairly discriminatory. There are situations where the idea of "fair" discrimination applies, for instance to minors in matters calling for experience and maturity; to harm-doers and to disseminating demonstrable and injurious falsehoods, for example libel. But can non-theists be deemed by any objective, fair and conclusive criteria to be like minors, harm-doers or propagators of demonstrable falsehoods? I submit on the basis of long, personal acquaintance with non-theists both religious and secular, that it is unfair in the extreme to hold that they can.

4.4 Just as ethically untenable, if one believes in equality and justice for all, is the view that discrimination against our nontheists is acceptable because there are so few of them. Lest there be any doubts about the fallacy of this notion, the case of Nazi Germany, where the Jewish people were also a small minority, will surely end them.

4.5 It might be replied that the Preamble does not count for much. I however regard it as a highly significant expression of the basic aspirations and values of the new South Africa. Therefore, even the inadvertent creation of a new kind of second-class South African in our **Preamble** is a serious and tragic injustice.

5. The same arguments apply to the oaths of Office. A non-theist could in future hold high office in South Africa. It is unfair in the extreme to force such a person to utter a belief he or she does not hold in the taking of a solemn oath.

6. If the augmented wordings I proposed above are for technical reasons impossible, then it would still be better for the theistic expressions to be removed than for them to be retained if the Constitution is to comply with the prohibition against discrimination in the relevant Constitutional Principles.

Submitted in his personal capacity **by:**

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(Approximately 950 words of text)

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

DEFENCE OF THE CERTIFICATION OF THE NEW CONSTITUTION

- 1 This is a request for leave to defend the certification of the new Constitution by the Constitutional Court in matters relating to reproductive rights.
2. The request is from **the Reproductive Rights Alliance**, an **alliance** of 20 non-governmental organisations, including the Planned Parenthood Association, National Progressive Health Care Network, Women's Health Project, Centre for Applied Legal Studies Gender Project, Lawyers for Human Rights, Reproductive Health Research Unit and many other organisations.
3. The Alliance is committed to creating. and promoting a liberalised, safe and legal framework for reproductive health and well-being.
- 4 The Alliance is **a** broadly representative body, and as such has **a** legitimate interest in defending, the Constitutional provisions relating to reproductive rights and health.
5. The Alliance is aware that the reproductive **rights** contained in the new Constitution will be challenged by various religious and other groupings, who will request non-certification on this basis. We do not know the extent of the arguments, as we have not had access to these submissions.
- 6 We request leave to reply comprehensively to the arguments raised in other submissions, and **to** this end request an extension until 10 June 1996 **to** reply.

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