

28 May 1996

THE RIGHT TO KEEP AND BEAR ARMS FOR LEGITIMATE PURPOSES

Attached please find an article that I have prepared publication which clearly illustrates my absolute dismay with way democracy is practised.

Both the South African Gun Owners' Association and myself have made elaborate representations to the Constitutional Assembly which were substantiated by a large number of individual representations (14410). All these people obviously are law abiding citizens. But just like in the case of the pro-death penalty representations, they were just brushed aside. It is clear that the government wants to have the final say and the absolute power. The populace cannot be trusted.

Elaborate measures have recently been announced to curb crime. Mention is also made of more stringent steps regarding the licencing of firearms. Only a "person" foreign to this world may not know that the largest majority of violent crimes are committed by criminals who possess unlawfully obtained weapons. But again, this is probably immaterial - it is so much easier to blame an inanimate object than a person.

So, whatever value these last-minute remarks may have, you requested to kindly convey it to the Constitutional Court.

DEMOCRACY ... FACT OR FICTION?

In all the advertisements of the Constitutional Assembly the public were urged to participate in the making of the new constitution. After all, this is what democracy is all about ... the populace rules, not the politicians. The motto of the Constitutional Assembly in fact spells it out: "You have made your mark - Now you have your say." Democratic constitution making sounds fairly simple. The politicians, who were elected by the electorate and who are therefore representing the electorate in the highest negotiating chambers, are supposed to carry out the will and wishes of the electorate. Taking these simple concept,; into account there should not be any reason why reasonable requests could not be carried through by the political' representatives.

But does this in fact happen? Don't be surprised if I tell you that it does not happen - not in your wildest dreams! This so-called democratic decision-making is nothing but fancy window-dressing. How can it be something else if Mr Cyril Ramaphosa said that the constitution was specifically drafted for those who had been denied basic rights in the past? Must a constitution be drafted only for certain people or must it address all major issues, also those which the politicians themselves do not ask for? Why must it provide only for the wrongs of the past? Why does it not rather provide for the realities of the day? The views of the ruling party of the Government of National Unity is clearly based on what Albie Sachs wrote in 1990 in Protecting Human Rights, Oxford University

Press, p18: "Just as there is no area of South African life that apartheid has left untouched, so it will be necessary to extend affirmative action to every aspect of society - health, education, work, leisure, to mention but a few."

Contrast this viewpoint now with what a liberal French economist wrote in 1850 (Frederic Bastiat, *The Law* (Irvington-on-Hudson, New York: The Foundation of Economic Education, 1987 at p67): "It is not true that the function of law is to regulate our consciences, our ideas, our wills, our education, our opinions, our work, our trade, our talents, or our pleasures. The function of law is to protect the free exercise of these rights ...").

Note too what William Buckley, who authors *Viewpoint in New Dimensions*, said in this regard: "Democracy, to be successful, must be practised by politically mature people, among whom there is consensus on the meaning of life within their society."

As many political leaders tell us that South Africa sets an example of what democracy is, why am I so cynical about this matter? It is because I have just received my copy of the Refined Working Draft New Constitution. I immediately paged to article 10 which provides for the right to life wanted to see whether SAGA's representations had any effect. To my surprise (I'm lying, I was not really surprised) it still reads as before: "Everyone has the right to life" (There are two options which provide for the death penalty).

In Table 2 of the Draft it is stipulated that 14410 pro-gun petitions were received, the third most (only pro death penalty and animal rights received more). I believe many more submissions were in fact faxed but were not received because the fax mach of the Constitutional Assembly has at some stage either b switched off or was out of order.

Regarding the submissions the following is stated in paragraph 15.5 of the Draft: "Many individual submissions linked the right to life to the right to self-defence and the right to own fire- arms. The CA received 14410 submissions stating that Constitution should be amended to recognise the right to fire-arms and to place a limitation on government's power disarm the civilian population. These petitions (sic) also argued that the right to life should be qualified by allowing justifiable homicide, inter alia, in defence of any person f unlawful violence or, in order to effect a lawful arrest or prevent the escape of a person lawfully detained."

Certain questions immediately come to mind: What purpose did the

Certain questions immediately come to mind: What purpose did submissions serve? Were they ever discussed? Did any politic or political party argue in favour of gun rights? Why were t (the submissions) apparently just brushed aside?

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If the submissions were not discussed or merely brushed aside will have serious reservations about the democratic process. It is not that the political parties did not know - they had received a copy of our representations. So much for politicians working for the electorate!

It will probably be argued that it is not necessary to entrench in the Constitution the right to keep and bear arms because sufficient freedom is guaranteed. It will further be argued that all the rights that we want protected are already sufficiently protected by various laws, eg section 49 of the Criminal Procedure Act, 1977 (the right to use reasonable force when executing arrest in the event of the arrestee not subjecting himself to the arrest or fleeing); the common law right of private defence; section 3 of the Arms and Ammunition Act, 1969 (the right to own firearms once licences have been granted); and various Nature Conservation Ordinances which provide for legitimate hunting.

For at least two reasons the above-mentioned rights cannot be regarded as being properly protected, viz (i) the Constitution is the supreme law of the land and any 'law or conduct inconsistent with it is invalid' (article 2(1) of the Constitution); and (ii) any law can easily be repealed or amended - a simple majority vote in parliament is required.

Specifically with regard to legitimate private defence it may be argued that the Bill of Rights (Chapter 2) provides sufficient safeguards. The following may be cited:

- (i) Article 7: "The state must respect, protect, promote, and fulfil the rights in this Bill of Rights."
- (ii) Article 8(1): "Everyone is equal before the law and has the right to equal protection and benefit of the law."
- (iii) Article 10: 'Everyone has the right to life.'
- (iv) Article 11(2) : "Everyone has the right to security of the person, including the right:
 - (a) to be free from all forms of violence;
 - (b) to [bodily/physical] and psychological integrity;"

In practical reality these rights are but little consolation for the person who is facing a violent attack. There is no doubt that because politicians are fond of reacting to emotional matters and because they don't mind gambling with people's lives, the right to private defence and the right to possess the means to do so ought to be protected in the Constitution. A clear example of how politicians react to emotional matters is the Australian government who now want to impose even stricter gun-control measures after the massacre in that country. Is it so difficult to understand that as inanimate objects, guns need no control -- criminals and mentally ill people need control.

As people have rights before they have a state, the state exists only to protect people's rights. If the state or any of its organs is unable to do so, the individual must have the right to do so himself. Therefore, in the words of the liberal Bastiat: "If every person has the right to defend - even by force - his person, his liberty, and his property, then it follows that a group of men (read people) have the right to organise and support a common force to protect these rights constantly."

In the second paragraph I remarked that this democratic decision-making is nothing but fancy window-dressing. Having read the above you be the judge!

[Editor's Note: Article 'Commentary on the Constitution' illegible]