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LEGAL OPINION

[Confidential]

TO: **Chairpersons of the Joint Constitutional Review Committee**

COPY: **Acting Secretary to Parliament [Ms P N Tyawa]**

FROM: **Constitutional and Legal Services Office**
[Adv Z Adhikarie, Chief Parliamentary Legal Adviser]

DATE: **30 November 2020**

REF: **139/2020**

SUBJECT: **SUBMISSION BY MR BALLOT**

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INTRODUCTION

1. Our Office was requested to advise on the submission of Justin Ballot, in which Mr Ballot requested the Constitutional Review Committee ('the Committee') to review sections 1, 2, 11, 12, 14, 27, 35, 38 of the Constitution of South Africa, 1996 ('the Constitution'), as well as considering the need for a clear constitutional limitation of government? Powers? during a declaration of a state of national disaster.

SUBMISSION 1:

Re Section 1 of the Constitution: "The sovereignty of the country must be strengthened so that outside, unelected organisation like the WHO cannot override our constitution."

2. Sovereignty in the context of section 1, in which Mr Ballot roots his review request, refers to sovereignty in territory. Dixon and McCorquodale[1] clarifies that—

> "Sovereignty is one of the fundamental concepts of international law. It is an integral part of the principle of equality of States and or territorial integrity and political independence that are referred to in Art. 2 of the United Nations Charter. Sovereignty is crucial to the exercise of powers by a State over both its territory and the people living in its territory."[2]

3. A country's association with any international forum or organisation is voluntary in terms of international law, and the basis of such is found in treaty law as international agreements. Such association therefore stands separately to the principle of exclusive competence of a State regarding its territory, though both are acknowledged within the realm of international law. So understood, Mr Ballot's review request should rather have been linked to section 231 of the Constitution, than section 2, when speaking to his perceived interference of 'unelected organisations like the WHO'. However, even if so linked, it does not amount to a sustainable legal argument.

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[1] *Cases & Materials on International Law* (4th Edition) at 234.

[2] In the *Islands of Palmas Case (The Netherlands v United States)* 2 RIAA (1928) 829, the arbitrator commented as follows: "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State... the principle of the exclusive competence of the State in regard to its own territory...". This also aligns with the fact that territory is one of the criteria for statehood.

4. Section 231 of the Constitution requires parliamentary ratification of treaties for it to bound South Africa. Dugard[3] explains that "the term 'international agreement' in s 231 is synonymous with 'treaty' and refers to legally binding enforceable agreements as defined in article 2 of the Vienna Convention on the Law of Treaties of 1969." The Vienna Convention defines a treaty as "an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."

5. A country's association with an organisation such as the WHO is therefore not an issue of territorial sovereignty, but one of international agreement and does not equate to undue interference by any organisation: any form of involvement of such an organisation will be in terms of the particulars reflected in the relevant international agreement. In South Africa, any risk of undue interferences is already safeguarded by international law, is further mitigated by the fact that section 231 of the Constitution requires the involvement of the executive and the legislature in establishing the terms and the extent of such association impacts on the local legal system.

6. It is submitted that the context in which Mr Ballot requests consideration of a constitutional amendment to strengthen the country's sovereignty has no standing in law.

SUBMISSION 2:

Re Section 2 of the Constitution: "The supremacy of the constitution must be strengthened forcing the ANC to justify (constitutionally) any action before that action is taken when possible. If not possible then within 7 days under an emergency."

7. Section 2 of the Constitution declares, as one of the founding provisions, that the "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".

8. The importance and consequence of the constitutional supremacy section can be highlighted by the following:

> "(a) The Constitution is the 'ultimate source of all lawful authority in the country'. Irrespective of its intention or motive, therefore, no organ of state 'can make any law or perform any act which is not sanctioned by the Constitution'.[4]

[3] *International Law: A South African Perspective* (3rd Edition) at 63.

[4] *Speaker of the National Assembly v De Lille* 1999 (11) BCLR 1339 (SCA) at par 14.

(b) The Constitution is binding on all spheres of government and all organs of state. When an organ of state exercises the powers that have been conferred upon it, therefore, it must do so 'in accordance with, and within the limits of, the Constitution'.[5]

(c) Any law or conduct that is inconsistent with the Constitution is invalid. The power to determine whether law or conduct is inconsistent with the Constitution has been vested in the courts, which are the 'ultimate guardians of the Constitution and its values'.[6]

(d) Any citizen adversely affected by a decree, order or action of an official or body, which is not properly authorised by the Constitution, is entitled to the protection of the courts and, therefore, '[n] Parliament, no official and no institution is immune from judicial scrutiny in such circumstances'[7]."[8]

9. The supremacy cannot be limited by any action or legislation. Any action or legislation purporting to do so in any circumstances, including emergency related circumstances, will be regarded as invalid and so declared by the judiciary. As such, it is submitted that section 2 of the founding provisions of the Constitution does not require any amendment.

SUBMISSION 3:

Re Section 11 of the Constitution: "The right to life … [must include] the right to refuse any form of forced euthanasia.

10. The general position is that the right to life is an absolute right in South Africa. In considering the constitutionality of the death penalty, the Constitutional Court in *S v Makwanyane*[9] looked at the rights to life and dignity and declared these to be the "most important of all human rights, and the source of all other personal rights in" the Bill of Rights.

11. As the right to life is an unqualified right, it includes within its ambit the State's duty to protect life as reflected in the Constitutional Court's judgment in *Carmichele v Minister of Safety and Security*:[10]

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[5] *Doctors for Life International v Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC) at par 38.

[6] *Doctors for Life International v Speaker of the National Assembly* supra par 38.

[7] *Speaker of the National Assembly v De Lille* supra at par 14.

[8] LAWSA 7(2) at par 14.

[9] 1995 (3) SA 391 (CC).

[10] 2001 (4) SA 938 (CC).

> "It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal provisions to deter the commission of offences against the person backed up by the law-machinery for the prevention, suppression and sanctioning of breaches of such provisions.

12. Euthanasia has not been legalised in South Africa, though it needs to be clarified that even if it was legalised, "forced euthanasia" would nevertheless be regarded as a crime, as such does not fall within the understanding of assisted suicide, which is the focus of euthanasia as legalised in other jurisdictions. So understood, the South African Law Commission (SALC) in its Report on Project 86: *Euthanasia and the Artificial Preservation of Life* (1998),[11] stated that "[a]uthority exists in our law to the effect that the hastening of a person's death, if it was done unlawfully and with the necessary intention, would constitute murder".[12]

13. The context in which a constitutional amendment has been submitted does not require consideration of a constitutional amendment, as euthanasia at present is not legalised in South Africa. The necessity for legislation to legalise aspects of such as identified by the South African Law Commission is a policy decision for the legislature to consider. However, even if so considered and legislated, forced euthanasia would still amount to a crime and carry the relevant provisions of the criminal justice system and required that system to comply with the constitutional standard of the absolute right to life.

SUBMISSION 4

Re Section 12 of the Constitution: Inclusion of "The right to self-defence and the right to bear arms."

14. The context within which Mr Ballot is requesting the Committee to consider a constitutional amendment as far as the 'right to self-defence and the right to bear arms' is not clear. It is presumably linked to section 12 of the Constitution that speaks to the "freedom and security of the person", specifically section 12(1)*(c)*, which stipulates that "[e]veryone has the right to freedom and security of person, which includes… to be free from all forms of violence from either public or private source".

15. Unlike the Constitution of the United States, the Constitution of the RSA does not enshrine the right to bear arms. South Africa's legal system does however recognise self-defence as a defence in response to an unlawful and violent attack. Our legal system also allows for the possession of fire arms as per the

[11] At page 51. See also South African Law Commission, Euthanasia and the artificial preservation of life: Discussion Paper 71 (1997).

[12] It is also noteworthy that the SALC in the same report highlighted the importance of the element of informed consent in circumstances where legislation could be developed to decriminalise euthanasia and deal with issues of voluntary euthanasia.

requirements prescribed through legislation. The concern raised by Mr Ballot that the right to self-defence and the right to bear arms should be included in the scope of section 12 is issue that relate to the scope of the justice system, and is already made allowance for in law in a manner that is constitutionally acceptable.

16. It is therefore submitted that, given the fact the South Africa's legal system already regulates the 'rights' highlighted by Mr Ballot, his submissions does not attract issues that call for the consideration of the Committee when reviewing section 12 of the Constitution for possible amendment.

SUBMISSION 5

Re Section 14 of the Constitution: "The right to privacy for murderers does not apply because the victim should have more rights than the criminal. The ability to track the most serious crimes using meta data for the investigation."

17. Mr Ballot's argument regarding the submission that section 14 of the Constitution dealing with privacy appears to be two pronged:

17.1. a balance between the rights of victims and the rights of accused/sentenced persons; and
17.2. tracking systems to assist with serious crime investigation.

18. Section 14 of the Constitution provides as follows with regard to the right to privacy:

> "Everyone has the right to privacy, which shall include the right not to have—
>
> *(a)* their person or home searched;
> *(b)* their property searched;
> *(c)* their possessions seized; or
> *(d)* the privacy of their communication infringed."

19. Given the scope of the right to privacy so quoted, Mr Ballot's submission that there is a need to limit 'the right to privacy for murders' seem misplaced and does not require the Committee's consideration of a constitutional amendments. It should further be noted that where the limitation of rights enshrined in the Bill of Rights are to be allowed in relation to a person found guilty of murder, that limitation stands to be tested against the requirements of section 36 of the Constitution, also referred to as the limitation clause of the Bill of Rights.

20. The concern raised regarding the need for a tracking systems to assist with serious crime investigation, is an operation issue and not a legal one, and is not something that stands to be addressed in the possible amendment of section 14, as rights in the Bill of Rights are intentionally framed in a broad manner to allow for its adaptability throughout the ages and so give the Constitution the character of a living document.

SUBMISSION 6

Re Section 27 of the Constitution: "The government cannot force a person to be vaccinated against their will. Provision to opt out of mandatory vaccinations must be part of constitutional protections. Government control, or scientific expert control of who can be euthanised must be illegal. This is up to the individual or the family. Automatically the default setting in no euthanasia."

21. As far as it relates to this submission, concerns regarding euthanasia have been addressed under submission 3, while concerns regarding unconstitutional action by organs of state (i.e. government control) has been discussed under submission 2. For similar reasons as highlighted in terms of submissions 2 and 3, the submission of Mr Ballot in terms of submission 6 does not require the Committee's consideration of an amendment to section 27.

22. As for Mr Ballot's argument that further amendment of section 27 is required, because "government cannot force a person to be vaccinated against their will", consideration must be given to the specific wording of section 27 as far as health care is concerned:

> "(1) Everyone has the right to have access to—
>
> *(a)* health care services including reproductive health care;
>
> …
>
> (2) The state must take reasonable legislation and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
>
> (3) No one may be refused emergency medical treatment."

23. Although everyone has the right to health care (which the state must progressively realise) and no one can be refused emergency medical treatment, that does not stand to be interpreted that in general people can't refuse medical treatment if they so wish:

"**People with decisional capacity may refuse life-sustaining medical treatment** with regard to an illness or injury from which they may be suffering even though such a refusal may hasten their death. In *Castell v De Greeff* it was confirmed that **the right stems from the person's fundamental right to self-determination, which includes the right to bodily integrity and that it relates to the doctrine of informed consent** which recognises the autonomy of the patient to make decisions regarding whether he or she wishes to receive or does not wish to receive medical treatment… In terms of the doctrine of informed consent, physicians must inform their patients about the material risks and benefits of recommended treatment and the patient must decide whether to undergo the treatment or not. What is more, **the patient's judgment of his or her interests is decisive** and, as pointed out by Ackerman J in *Castell v De Greeff*: 'It is, in principle, wholly irrelevant that her attitude is, in the eyes of the entire medical profession, grossly unreasonable, because her rights of bodily integrity and autonomous moral agency entitle her to refuse medical treatment.' "[13]

24. The default position is therefore that the decision to accept or refuse medical treatment is always that of the patient.

25. Were specific circumstance to arise where vaccinations for certain diseases could be made obligatory, that limitation would require our Courts to weight the public interest (which is would presumably serve) against individual rights relating to health (section 27) and freedom and security of person (section 12), to determine whether such a limitation of a person's right to self-determination would be regarded as reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom in the context of the test as set out in section 36 Constitution. Protection of unconstitutional and unjustifiable action regarding healthcare as per Mr Ballot's submission therefore does not require a constitutional amendment of section 27, as the protection of individual rights in that context is already provided for.

SUBMISSION 7

Re Section 35 of the Constitution: "Must include the rights of a person who is detained under a quarantine as this can be abused. This includes employment, finance and living space protection. In other words a person detained under quarantine cannot lose their job, be kicked out the property, lose their income or vehicle, be blacklisted etc."

26. Section 35 of the Constitution speaks to the rights of "arrested, detained and accused persons". Mr Ballot's request for amendment of section 35, so defined in focus, to address quarantine detention of individuals in the public interest, such as that associated with the current Covid-19 pandemic, is

[13] Jordaan "The legal validity of an advance refusal of medical treatment in South African law (part 1)" [2011] DEJURE 23 at 25.

misplaced and does not require constitutional amendment consideration by the Committee.

27. While section 35 entrenches fair trial principles in the Constitution, the issues of employment, finance and living space does not fall within the ambit and intent of this section. Such issues attract the application of right to fair labour practices (section 23), freedom to trade, occupation and profession (section 22), right to property (section 25) and right to housing (section 26). Infringement of these rights by any organ of state will have to be determined on a case-by-case basis and in terms of legislation enacted to give effect to these rights.

28. So understood, as the submission speaks rather to the application of rights and related legislation to individual complaints of rights infringement and not the working of any right or section 35 specifically, it is submitted that this submission does not require the Committee to consider a constitutional amendment.

SUBMISSION 8

Re Section 38 of the Constitution: 'The state must set up an organisation within the judiciary to assist people in approaching the courts to report human rights abuses, and especially during a lockdown and state of disaster."

29. Section 38 of the Constitution speaks to the natural and juristic persons who have standing to approach the courts on the enforcement of rights in the Bill of Rights. The section reads as follows:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and a court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—
>
> *(a)* anyone acting in their own interest;
> *(b)* anyone acting on behalf of another person who cannot act in their own name;
> *(c)* anyone acting as a member of, or in the interest of, a group of class of persons;
> *(d)* anyone acting in the public interest; and
> *(e)* an association acting in the interest of its members."

30. Although it does not speak to an organisation within the judiciary, it is informative to note that in terms of the above quoted scope of section 38, a person seeking redress for human rights infringements through the justice system, but without the means to do so, could be represented by civil society organisations for purposes of access to justice.

31. As access to justice appears to be the main focus of this submission by Mr Ballot, his reliance on section 38 as his primary focus is misplaced, as section 34 of the Constitution entrenches the right to access to courts:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court **or, where appropriate, another independent and impartial tribunal or forum**."

32. The entrenchment of access to justice, does not negate the fact, as pointed out by Justice Moseneke, that when it comes to access to courts, "proper access to justice is often a function of one's bank balance".[14] It is for that reason that measures have legislatively been taken to elaborate on "another independent and impartial tribunal or forum". One example of such has been the establishment of the Commissions for Conciliation Mediation and Arbitration (CCMA) for purposes or creating a forum where labour disputes can be resolved without the additional litigation expenses associated with attorneys and lawyers.

33. In terms of the legal expenses related to representation, the Legal Aid South Africa Act 39 of 2014 was enacted to ensure access to justice and the realisation of the right of a person to have legal representation as envisaged in the Constitution and to render or make legal aid and legal advice available. For that purpose, the Act established the independent and impartial entity known as Legal Aid South Africa to provide free legal services and access to legal practitioners for persons who earn below a certain threshold

34. The Constitutional Assembly in drafting the Constitution, being alive to the inequality that characterises our society with regard to access of justice, also built in additional protection, outside of the courts, in Chapter 9, where specific allowance is made for the South African Human Rights Commission (SAHRC). Looking at the SAHRC (as regulated that South African Human Rights Commission Act 40 of 2013) from the perspective of Mr Ballot's submission, it is important to note its constitutionally endorsed functions and powers as set out in section 184(1) and (2) of the Constitution:

> "(1) The South African Human Commission must—
>
> *(a)* promote respect for human rights and a culture of human rights;
>
> *(b)* promote the protection, development and attainment of human rights; and
>
> *(c)* monitor and assess the observance of human rights in the Republic.

[14] DCJ Moseneke, "Reflections on South African Constitutional Democracy – Transition and Transformation", Key Note Address at the Mistra-Tmali-UNISA Conference, 12 November 2014.

(2) The South African Human Rights Commission has the powers, as regulated by national legislation —

(a) to investigate and to report on the observance of human rights;

(b) to take steps to secure appropriate redress where human rights have been violated;

(c) to carry out research; and

(d) to educate.

35. Similarly, section 182 of the Constitutions stipulates that the Public Protector (as regulated by the Public Protector Act 23 of 1994) must be accessible to all persons and communities, and in section 182(1) is assigned the functions to—

"(a) to investigate any conduct in state affairs, or in the public administration in my sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) to report on that conflict; and

(c) to take appropriate remedial action."

36. The concerns raised are therefore not unregulated and do not require amendment of the Constitution to provide the relief sought. It may however be an issue of implementation of legislation or a need for further strengthening or extending the mechanisms in place to provide access to justice. Such is a policy decision which could be referred to the relevant parliamentary committees.

SUBMISSION 9

State of Disaster Regulations

37. This submission, does not speak to specific provisions in the Constitution relating to a state of disaster; it speaks to implementation of legislation and regulations and the possibility of testing such instruments and related actions against constitutional rights for possible infringements.

38. The Constitution does not provide details regarding legislation and regulations, but rather provides guidance for the implementation of rights, and where required places obligations on role-players regarding states of disaster.

39. As discussed above, whenever someone feels their constitutional rights are being infringed, whether by legal instrument or action, the Constitution allows for such for be tested for validity (including limitation) through its provisions and those of legislation emanating from it —it does not require amendment for such to be the case.

40. Within this understanding, Mr Ballot submits the following as it relates to a state of emergency:

40.1. **“There need to be clear constitutional limitations for the government in a state of disaster.”**

When it comes to the protection of rights, section 36 of the Constitution (also referred to as the limitations clause), puts in place a test to determine if any rights limitation would be considered constitutional. If the legal instrument or action infringing on a right fails that test, it is regarded as unconstitutional and invalid. In so far as “government in a state of disaster” can then put in place regulations that limit right, the Constitution already has that safeguard incorporated and there is no need for the Committee to consider an amendment of its provisions.

40.2. **“There need to be a civilian and judicial/parliamentary oversight over any state of disaster councils eg NCC to prevent abuse of power.”**

Oversight is a constitutional obligation placed on the Parliament through the Constitution, as are the responsibilities bestowed on the Judiciary. The functions of neither these arms of state are limited or prevented by the declaration of a state of disaster. Mr Ballot’s submission in this regard has no legal standing.

40.3. “**Suspending parliament or the judiciary during a lockdown state of disaster is unconstitutional.”**

If the declaration of a state of disaster (and inclusive lockdown measures) would attempt to suspend the powers of Parliament and the Judiciary, that would be unconstitutional. However, as pointed out above this is not allowed and the Constitution already has sufficient safeguards in place —no constitutional amendment is required to address such concerns.

40.4. **“During any state of disaster, civilians are also a stakeholder as the rules affect them.”**

In terms of South African’s Constitution, everyone (therefore “civilians” or citizens included) falls within its protective ambit and are stakeholders in terms thereof. As discussed above, where legal instruments or actions infringe upon rights protected in the Constitution without a justifiable limitation in terms of section 36 of the Constitution, such instrument or action is invalid and unconstitutional. As such whenever a “rule” affecting people is put in place stakeholders (or their mandated representatives) have a vested interest. It is for that reason that the Constitution calls on Parliament to facilitate public

involvement throughout its processes, as it has been constitutionally mandated to do oversight over the implementation of legislation (and related regulations and actions) administered by the Executive.

40.5. **"Transparency of any external experts used, especially financial and organisational links must be published."**

The values of openness, responsiveness and accountability underlie the framework of the Constitution. The concept of transparency falls within that value system, and is linked to the concept of accountability that holds that "government must explain its laws and actions if required to do so and may be required to justify them".[15] Section 32 of the Constitution, enshrining the right of access to information, is linked to this understanding of the values, and its scope and application is regulated by the Promotion of Access to Information Act 2 of 2000:

> "One of the aims of the Act is to promote transparency, accountability and effective governance by empowering people to scrutinise and participate in decision-making by public bodies that affect their rights."[16]

Mr Ballot's concern therefor does not require a constitutional amendment as section 32 as the right of access to information already provides a sufficient basis for the rights-protection. It may be that a policy decision could require that the legislation giving effect to section 32 of the Constitution could be strengthened, but such a consideration could be deferred to the relevant parliamentary committee.

40.6. **"The military cannot be used as an enforcement tool as their powers fall outside the constitution. Their mandate during a state of disaster must be humanitarian. If needed for enforcement, state of emergency provisions apply for a limited time and location with heave oversight.**

Sections 200 to 204 of the Constitution specifically focuss on defence force ('the military') in setting out its objective (section 200), political responsibilities (section 201), the command of the defence force (section 202), the state of national defence (section 203), and defence civilian secretariat. The Defence Act 42 of 2002 regulates the implementation of this framework set out in the Constitution.

In the context of a state of disaster, section 201 of the Constitution, read with section 19 of the Defence Act, allows the President to employ the SANDF to act in co-operation with the SAPS. In being so employed, the SANDF (who in general do not possess law enforcement powers) can act with law enforcement power similar to

[15] Currie and De Wall, *The New Constitutional and Administrative Law: Volume One* (2001) at 89.

[16] Currie and De Wall, *The New Constitutional and Administrative Law: Volume One* (2001) at 89.

that bestowed on the SAPS, as per the list of powers detailed in section 20(1) of the Defence Act, and with the express exclusion of investigative powers in section 20(3).

In the context of a state of emergency (declared by Parliament in terms of a high threshold set in section 37 of the Constitution) the employ of the SANDF is less clear. Within this context, the State of Emergency Act, 64 of 1997 was adopted to "provide for the declaration of a state of emergency; to empower the President to make regulations in pursuance of any such declaration and to provide for matters connected therewith". However, the State of Emergency Act provides no clear details as to steps to be taken or powers to be exercised. For example, it is completely silent on the mobilization of SANDF members following the declaration of a state of emergency. It does however make provision for Parliamentary supervision (section 3 of the Act) and the lapsing of emergency regulations (section 4 of the Act).

So contextualized, the concerns raised in this submission do not require a constitutional amendment, as the Constitution already includes the defence force within its mandate. Rights and interests linked to a state of disaster or state of emergency are also subject to the Constitution. The concerns raised may require a policy decision to determine whether the legislation giving effect to the disaster and emergency related provisions of the Constitution should be reviewed and amended. Such a policy decision can be dealt with by the relevant Parliamentary committees.

CONCLUSIONS

41. Considering the above discussion of the submissions made by Mr Ballot, no constitutional amendments are required, as the framework of the Constitution and the legislation giving effect to it, sufficiently cover the concerns raised.

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