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MEMORANDUM
[Confidential]

TO: Dr M S Motshega, MP and
Mr EM Mthethwa, MP
Co- Chairpersons: Joint Constitutional Review Committee

COPY: Ms P N Twaya
Acting Secretary to Parliament

FROM: Adv Z Adhikarie
Chief Legal Adviser: Constitutional and Legal Services Office

DATE: 30 November 2020

REF: 136 / 20
CRC 33/20

SUBJECT: Request to review Preamble of the Constitution, 1996

MESSAGE: Please find attached the above memorandum for your attention



Adv Z A Adhikarie
Chief Parliamentary Legal Adviser



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LEGAL OPINION
[Confidential]

TO: Mr E M Mthethwa, MP and Dr M S Motshekga, MP
Co-Chairpersons: Joint Constitutional Review Committee

COPY: Ms P N Tyawa
Acting Secretary to Parliament

FROM: Adv. Z Adhikarie
Chief Legal Adviser: Constitutional and Legal Services Office

DATE: 30 November 2020

REF: 136/20
CRC 33/20

SUBJECT: REQUEST TO REVIEW PREAMBLE OF CONSTITUTION, 1996

INTRODUCTION

1. Our office is requested to prepare a legal opinion for the Joint Constitutional Review Committee (“the Committee”), on the submission by the President of the South African Secular Society, Mr Rick Raubenheimer. The South African Secular Society submits that the Constitution in its Preamble glaringly contradicts itself and unfairly discriminates on the minority none-religious population of the country. Mr

Raubenheimer's submission seeks a review of the Constitution's Preamble by removal of references to God or gods.

2. The South African Secular Society submits that the Preamble and section 9, dealing with the right to equality, of the Constitution contradicts each other as it creates discrimination and disunity between South Africans. Thus, they request the Joint Constitutional Review Committee (JCRC) to consider removing references to any divinity or divine beings in the Preamble.

OVERVIEW OF SUBMISSION

3. The submission sets out the following arguments-
 - a) Through quoting and highlighting relevant parts of section 9(3) of the Constitution, the argument is that the state may not unfairly discriminate directly or indirectly against anyone on one of 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. We make an assumption that this concern fall within sections 9, 15, 16(1)(b), 18, 30 and 31 of the Constitution.
 - b) The submission quotes parts of the Preamble that make exhortation and prayer that God protect South Africa in different official languages.
 - c) The submission is that a minority none-religious group as classified by the 2001 census, constitutes 15.1 % of the population. In our view sections 15, 30 and 31 of the Constitution find relevance.
 - d) The submission indicates that any reference to god is an anachronism to those that do not consider gods as real. It is pointed out that such reference is an insult to their intelligence and rational beliefs but also as a way of excluding the secular members of society from full participation. The submission does not state who prohibits or excludes secular members of society or from what participation.
 - e) The submission indicates that Covid 19 made it obvious that no god exists since s/he did absolutely nothing to protect people. They allege that scientific knowledge used by government averted the catastrophe.
 - f) Lastly, the submission requests that the Committee recommend the removal of three clauses referring to God in the Preamble.

LEGAL FRAMEWORK

4. The Constitutional Court (the Court) in the certification judgments provided guidance and jurisprudence, amongst other things, on the constitutionality of the Preamble of the Constitution¹. These two judgments are *In Re: Certification of the Constitution of the Republic of South Africa, 1996 (CCT23/96) 1996 (10) BCLR 1253 (CC)* (Certification judgment) and *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 (CCT37/96) 1997(1) BCLR 1* (the Amended New Text Certification). The Court emphasised the deep divisions experienced in this country. We can add that the South African Secular Society submission is testimony and evidence of the country's diversity. The Court further reiterated that during the certification judgments both the Preambles to the Interim Constitution and Final certified Constitution are constitutional.

5. In the Amended New Text Certification, the Court said as follows:

We wish to conclude this judgment with two observations. The first is to reiterate that the CA has drafted a constitutional text which complies with the overwhelming majority of the requirements of the CPs. The second is that the instances of non-compliance which we have listed in the preceding paragraph, although singly and collectively important, should present no significant obstacle to the formulation of a text which complies fully with those requirements.

6. The Court expressed the complications found in the process of certifying a constitution for a society as deeply divided and diverse as that of South Africa. In respect of the

¹ The final and certified Constitution 1996 of the Republic of South Africa (Constitution). The South African Secular Society's submission quotes the relevant parts to which they seek reference to God be removed.

Preamble, Raubenheimer's submission transverse three Constitutional Principles (CP) out of the 34, namely; Constitutional Principle II², CPIII³ and CPXII⁴.

7. The 34 CPs were characterised by the Preamble of the Interim Constitution as the solemn pact and the guidelines towards establishing a new democratic order of governance. As adopted, the constitutional principles gave content to the Bill of Rights with two components. The one was "fundamental human rights, freedoms and civil liberties" and "universally accepted" fundamental rights, freedoms and civil liberties. Section 9(3) of the Constitution provides the protection of and a right to equality in order that no person is unfairly discriminated against on the ground of religion, amongst others. The right to equality is also a non-derogable⁵ right.
8. The structure of the Constitution plays a crucial role with each of its provisions having a purpose. The purpose of the Preamble is to provide context and background together with the commitment that the nation took through its representatives.

Right to belief and equality

9. Section 9 of the Constitution guarantees the right to equality before the law and entrench the right to equal protection and equal benefit of the law, whilst the provision prohibits discrimination and guarantees equal enjoyment of all rights and freedoms.⁶
10. Section 15 of the Constitution provides for rights to freedom of conscience, religion, belief and opinion. The relevant sub-provision at section 15(1)⁷ stipulate as follows:

² Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having due consideration to inter alia the fundamental rights contained in Chapter 3 of the Interim Constitution (IC).

³ The Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity.

⁴ Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free association, be recognised and protected.

⁵ See the table of non-derogable rights under s37 of the Constitution.

⁶ Section 9(1) - (3) of the Constitution of the Republic of South Africa, 1996.

⁷ The CC found that this provision provides the fullest protection for freedom of conscience and religion. Furthermore, court held that the rights of atheists to be free from discrimination are adequately protected by s 15 and s 9 of the Constitution. The CC went further pointing out that schedule 2 of the Constitution afforded the option of making a solemn affirmation rather than swearing an oath of office, and it is only in the case where the inductee opts to swear an oath that she or he is required to use the words "So help me God".

Everyone has the right to freedom **of conscience, religion, thought, belief and opinion.**

This right protects all forms of belief without exception.

(Bold and underline is our emphasis)

11. The Certification judgment at paragraphs 203 to 206 captured the following about the Preamble in reference to expressions about God:

Preamble

203. *A number of objections were raised against the preamble to the NT. Several objectors complained that the words “**in humble submission to almighty God**” which appear in the preamble to the IC are not repeated in the NT. That is said to violate CP II and IC ch 3. On the other hand, another objector objected to **the inclusion of the invocation “[m]ay God protect our people”** as discriminatory against non-theists, in violation of CP III.*

204. *These objections are founded on a misunderstanding... The first set of objectors pointed to no CP which mandates the inclusion of any particular religious reference in the preamble. Nor did the second demonstrate that the invocation of a deity constitutes any form of discrimination against non-theists which breaches a CP.*

205. *We also cannot agree with the contention by an objector that the preamble to the NT emphasises the injustice of the past rather than equality, non-discrimination and reconciliation, and thereby fails to comply with CP III’s mandate that the NT promote “national unity”. While it is true that the preamble “[r]ecognise[s] the injustices of the past”, and “[h]onour[s] those who suffered for justice and freedom”, it also “[r]espects those who have worked to build and develop” South Africa, **affirms that “South Africa belongs to all who live in it, united in our diversity”**, and specifically seeks to “[h]eal the divisions of the past” and “[b]uild a united and democratic South Africa”. **The tenor of the preamble cannot thus be said to be contrary to the ideal of national unity established in CP III.***

(Bold is our emphasis)

12. The Court held that the objection to the Preamble failed to demonstrate that an invocation of deity constitutes any form of discrimination.

DISCUSSION

13. We are of the view that the same argument of the Court could be said of the submission from the South African Secular Society as the submission presents neither evidence of discrimination already experienced, nor are there any case studies they have conducted to support the argument.

14. It is therefore our view that the current South African and international jurisprudence conclude that no discrimination exists nor is it promoted through the current words of the Preamble. We however do note that the principle to separate the state from encroaching too much on people's religion or beliefs is equally protected and balanced through sections 15 read with sections 9, 30 and 31 of the Constitution.

15. In our view, the request to amend the Preamble of the Constitution as submitted is not supported by a legal justification.

ADVICE

16. The Constitution, CPs and jurisprudence demonstrate that the right to equality does not contradict the Preamble. The Certification judgment found that section 15, read with 30 and 31 enable every person whether individually or collectively to live a cultural or religious life of their choice without subjection to the regulation or restrictions by the state, unless criminal conduct occurs during the enjoyment or participation in one's cultural or religious life.



Adv Z Adhikarie
Chief Parliamentary Legal Adviser

30/11/20

Date: