



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

LEGAL SERVICES

PO Box 15 Cape Town 8000 Republic of South Africa
Tel: 27 (21) 403 2911
www.parliament.gov.za

Tel : [REDACTED]
Direct : [REDACTED]
Fax : [REDACTED]
Email : [REDACTED]

LEGAL OPINION

[Confidential]

TO : Hon Adv. S.P. Holomisa and Hon Mr B. A. Mnguni
Co-Chairpersons of the Constitutional Review Committee

COPY : Secretary to Parliament

DATE : 22 July 2011

SUBJECT : Submission: Mr B.B Ngobese

LEGAL ADVISER : Adv A Gordon

COMMITTEE REF : 9/11

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MEMORANDUM

To: Adv S P Holomisa, MP
Mr. B A Mnguni, MP
Co-Chairpersons of the Constitutional Review Committee

Copy: Secretary to Parliament

From: Constitutional and Legal Services Office
Adv A Gordon

Date: 22 July 2011

Subject: Submission: Mr. B B Ngobese

Background and Summary

1. A submission was received from Mr. B B Ngobese and his concern is that certain rights within the Bill of Rights (BoR) are "criminal-friendly". Whilst the submission appears to mention the word "review" it does not actually refer to any review but highlights surrounding circumstances and problems that impact on the effect of certain rights afforded to arrested and accused persons in terms of the BoR's.

The Submission

2. Section 28(g)
- 2.1 Section 28(g) of the Constitution provides as follows:

"Every child has the right-

- (a)... (f)
- (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be-
 - (i) kept separately from detained persons over the age of 18 years; and
 - (ii) treated in a manner, and kept in conditions, that take account of the child's age; ...".

- 2.2 Mr. Ngobese submits that this section creates the impression that crime perpetrated by a minor or teenager is not a real crime. It is submitted that minors and children should be educated to ensure that they are aware that crimes are punishable by law and that it affects the human rights of other individuals (i.e. the victim).
- 2.3 It is pertinent to note that section 28(1)(g) of the Constitution was entrenched in order to eradicate the grave injustices perpetrated against children prior to 1994 through unlawful detention. The Child Justice Act No. 75 of 2008 gives effect to section 28 of the Constitution in instances where children are in conflict with the law and are accused of committing an offence.
- 2.4 In *Centre for Child Law v Minister of Justice and Constitutional Development and Others (National Institute for Crime Prevention and the Re-Integration of Offenders, as Amicus Curiae) 2009 (2) SACR 477 (CC)*, Cameron J in the context of the applicability of the "minimum sentence legislation" to children between 16 and 17 years of age and section 28(1)(g) of the Constitution stated,

"[25] It is evident that this provision draws upon and reflects the Convention on the Rights of the Child. Amongst other things, section 28 protects children against the undue exercise of authority. The rights the provision secures are not interpretative guides. They are not merely advisory. Nor are they exhortatory. They constitute a real restraint on Parliament. And they are an enforceable precept determining how officials and judicial officers should treat children.

[26] The Constitution draws this sharp distinction between children and adults not out of sentimental considerations, but for practical reasons relating to children's greater physical and psychological vulnerability. Children's bodies are generally frailer, and their ability to make choices generally more constricted, than those of adults. They are less able to protect themselves, more needful of protection and less resourceful in self-maintenance than adults.

[27] These considerations take acute effect when society imposes criminal responsibility and passes sentence on child offenders. Not only are children less physically and psychologically mature than adults: they are more vulnerable to influence and pressure from others. And, most vitally, they are generally more capable of rehabilitation than adults."

- 2.5 On the basis that no submission is made in respect of section 28(g) that calls for a substantive review or amendment, there is therefore no proposal for the Committee to consider.

3. Section 32(1)(b)

- 3.1 Section 32(1)(b) of the Constitution provides as follows:

"Everyone has the right of access to-

- (a) ...
- (b) any information that is held by another person and that is required for the exercise or protection of any rights."

3.2 Mr. Ngobese submits that section 32(1)(b) should not apply to criminal matters as it allows the defence to gain an unfair advantage.

3.3 It must be mentioned that section 32(1)(b) does not specifically refer to accused persons and the rights relating to accused persons are contained in section 35 of the Constitution. However, if an accused person requires information that is held by another person in order to exercise or protect a right, then that accused person would have recourse to section 32(1)(b) of the Constitution.

3.4 Section 32 (1) (b) of the Constitution provides for the horizontal application of the right of access to information held by another person to everyone when that information is required for the exercise or protection of any rights. Whilst the submission argues that the defence in a criminal matter (the accused) may gain advantage if they receive information, the submission cannot be supported because an accused person is protected in terms of the BoR's and is included in the term "everyone".

4. Section 35(1)(a) to (d) and section 35(3)(g) to (j)

4.1 Section 35(1) (a) to (d) provides as follows:

"Everyone who is arrested for allegedly committing an offence has the right-

- (a) to remain silent;
- (b) to be informed promptly-
 - (i) of the right to remain silent; and
 - (ii) of the consequences of not remaining silent;
- (c) not to be compelled to make any confession or admission that could be used in evidence against that person;
- (d) to be brought before a court as soon as reasonably possible, but not later than-
 - (i) 48 hours after the arrest; or
 - (ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expires outside ordinary court hours or on a day which is not an ordinary court day;"

4.2 Mr Ngobese submits that an arrested person should not be afforded the right to remain silent. Also, that it is a mockery for a person who is arrested to be told by a police officer to remain silent. He further submits that an arrested person must merely cooperate with the Police in order to prove his/her innocence. And, that the 48 hours within which an arrested person must be brought before a court is too little time for the State to collect sufficient evidence for a bail hearing with the resultant effect being that the arrested person ends up being released.

4.3 Section 35(3)(g) to (j) provides as follows:

"Every accused person has a right to a fair trial, which includes the right to-

- (a) ... (f)
- (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

- (h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
- (i) to adduce and challenge evidence;
- (j) not to be compelled to give self-incriminating evidence;”.

- 4.4 Mr. Ngobese submits that it is unfair for an arrested person to be afforded a legal representative at the expense of the State. He states the State should not be assisting criminals in order to defeat victims. He reiterates his previous comments that arrested persons should not be allowed to remain silent and that they should not have access to information. Further, if an arrested person chooses to speak, then it is either a confession or admission of guilt and not “self-incriminating” evidence.
- 4.5 David Bruce, Kate Savage and Johan De Waal in *A Duty to Answer Questions?: The Police, Independent Complaints Directorate and the Right to Remain Silent 2000 SAJHR 81*, write that the fair trial rights in s35 of the 1996 Constitution afford protection to ‘accused’ persons. The various section 35 rights are underpinned by the right to a fair trial. However, it must be kept in mind that all rights within the BoR’s are subject to limitation as contemplated in section 7(3) of the Constitution.
- 4.6 In *Ferreira v Levin NO 1996 (1) SA 984 CC*, the court held that the right to a fair trial will be violated when self-incriminating evidence is obtained under compulsion from an examinee in an investigative inquiry and the evidence is then used against that examinee in subsequent criminal proceedings. However, in *Bernstein v Bester NO 1996 (2) SA 751 (CC)* authority is created for the proposition, that a person may be required to produce any book, paper or document and to answer any question put to him or her during an investigative examination even though the book, paper or document or any answer might tend to incriminate him or her. But, the admissibility of the evidence has to be determined by the presiding officer.
- 4.9 *Bruce et al* (2000:83) in respect of the right to remain silent seem to share the sentiment of Mr. Ngobese. They write that the right to remain silent is premised on an adversarial criminal justice system where the accused is not obliged to assist the State to prove or disprove the guilt of the accused. It essentially allows an accused person to refuse to cooperate with investigators. But then, the view is adopted by the writers that the right to remain silent should not be an obstacle in criminal investigations.
- 4.10 The submission by Mr. Ngobese does not speak to any amendment of review of the sections mentioned above. The theme of the submission centres on “unhappiness” about the manner in which certain of the rights in the BoR’s are perceived to be abused by arrested and accused persons. In essence therefore, Mr Ngobese does not highlight any matters of review for the Committee to consider.

5 Section 36


- 5.1 Section 36 of the Constitution provides as follows:

“(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity,

equality and freedom and taking into account all relevant factors, including

- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided for in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”.

- 5.2 Mr. Ngobese submits that the right of criminals should be limited in terms of an express application of a penal code.
- 5.3 Section 7(3) of the Constitution contemplates that a right in the BoR's may be limited in terms of section 36 or as provided for elsewhere in the BoR's. As set out above, a limitation of a right must conform to the requirements of section 36(1)(a) to (e), if the limitation is effected through a law of general application.
- 5.4 *Bruce et al* (2000:84) in the context of the Independent Complaints Directorate (ICD) considered limiting the right to remain silent in respect of police officers who are required to answer questions during inquiries. Bruce argues that the right to remain silent should be limited in terms of section 36. The argument is that police officers have extraordinary powers and should be held accountable for their actions. In this context, a law of general application may find impetus as it would be applicable to an identified category of persons, namely the police.
- 5.4 Mr Ngobese, in so far as his concerns are focused on criminals does not address an actual amendment or review on the limitation of section 35 of the Constitution and therefore there is no matter for the Committee to consider.


ADV A J GORDON
LEGAL ADVISER

TO: CONSTITUTIONAL REVIEW COMMITTEE

SUBJECT : REVIEWING OF SPECIFIC SECTIONS OF THE CONSTITUTION

1. PURPOSE

- 1.1 To bring to the attention of the Constitutional Review Committee the specific sections of the Constitution that I feel need to be reviewed.

2. BACKGROUND AND DISCUSSION

- 2.1 As per your invitation for Public Submissions on specific sections of the Constitution that needs to be reviewed by the Constitutional Review Committee, I hereby submit as follows:

3. Given all the rights enshrined in the Constitution of the Republic of South Africa, it is worth noting that no provision is made for a right to a crime free environment and or a right to adequate protection against crime. Therefore I am of the view that the sections of Constitution mentioned below are criminal-friendly and I feel that they need to be reviewed.

4. Children's Rights

Section 28 (g) creates the impression that a criminal conduct by minors or teenagers is not a real crime. It is grooming young criminals who will grow up with the belief that criminal conduct by children is considered not serious and therefore they can do as they wish. It should be noted that after each crime committed, no matter who committed it or how little it may appear, there is always an innocent victim(s) somewhere. Minors and teenagers should be educated from the early stages that doing crime is the violation of another human being's basic right and that it is punishable by law. The children should know as early as possible that doing crime is like putting your hand into the fire, you will burn your fingers.

5. Access to Information

Section 32 (b) should not apply in criminal matters. The defence gains an unfair advantage over the victim by accessing and use information which is in the interest of the complainant/victim. As the information is held by the state, only the state should produce such information when it has to prove a fact.

6. The rights of arrested, detained and accused persons

Section 35 (1) (a)-the right to remain silent to any suspected, arrested, accused and detained person should be withdrawn. This right boosts the criminals' ego, the feeling that they are the untouchables who are above the law. They intentionally commit all sorts of crimes knowing very well that when confronted by the authorities after being caught, they will exercise the right to remain silent. It is inhumane that a person commits a crime and keeps quiet as if nothing has ever happened. Any suspected or arrested persons are only questioned about what they know or their involvement in the commission of a particular crime, based on reasonable suspicions or facts. It is therefore expected that the suspects cooperate with the police.

(b) (1) and (11) reflect the mockery of the hard work by the police. I fail to understand the point in that, the police officer arrests a suspect and at the same time, tells the same suspect not to answer questions put to him/her about what s/he knows or his/her involvement in the commission of a particular crime. When questioning the suspect/arrested person, the purpose is to establish the truth. The suspected person should clear his/her name by cooperating and honestly answer all questions put to him/her. If s/he is indeed not involved or not implicated, there is obviously no need to detain such person.

(c) Any suspected, arrested, accused and detained person must just prove his/her innocence by cooperating with the police. The resistance indicates that such person is hiding something and this gives the police a valid reason to question and even detain such person. Cooperating with the police does not mean to admit or confess something one does not know.

(d) In most cases, the 48 hour period in which the arrested person has to appear before the Magistrate becomes too short for the police investigators to collect all the relevant evidence for the purpose of opposing bail (where necessary) and effective prosecution. It is this premature release of suspects that creates the impression that the state tolerates and condones crime by emphasizing the rights of people who derive pleasure from infringing upon other people's rights. Many cases are withdrawn due to lack of evidence and this leaves the victims and members of the society hopeless and disappointed at the state and this motivates some ordinary citizens to take the law into their own hands as the only option.

(3) (g) I consider it unfair that the arrested person should be provided with a legal practitioner at the expense of the state if s/he cannot afford. It would appear that the state takes the position of assisting the perpetrator to further defeat the victim who often has no financial, legal, moral or spiritual support.

(h) Here, the leniency of the Constitution towards crime is in the open. It is more sympathetic and protective to the criminals than it is to the innocent, vulnerable and law-abiding citizens. It should have contained a deterrent effect to the would-be offenders but the message it is sending to the society is that, one can commit crime and still remain constitutionally innocent, go on to ignore the police by keeping silent when questioned and finally defy the court by not testifying during the proceeding. In other words the criminals' rights are more important than those of the ordinary law-abiding citizens and victims of crime.

(i) While it is fair for the arrested person to adduce and challenge evidence, the Promotion of Access to Information Act should not apply to the defence as it compromises the victim/complainant who in turn would still have to be grilled by the defence and the state without any legal support on the victim's side.

(j) I consider the term "self-incrimination" as technical. My understanding thereof is that it is equivalent to either admission or confession. There is nothing wrong if a suspect feels that his/her conscience is against him/her and then chooses to admit or confess to what s/he knows or has done. By his/her own admission, further investigation has to be conducted and if it leads to successful prosecution, that is good.

7. Limitation of Rights

Section 36

The interpretation of this section is too wide. It would appear that the criminals' rights are not affected. Under this section, the suspects, arrested, accused and detained persons are continuing with their guaranteed rights to ignore the police by remaining silent and defy the courts by refusing to testify. It would be appreciated if the criminals' rights would be limited by the express application of the penal code.

8. CONCLUSION

The Constitution should put more efforts in ensuring that everybody carries out the personal duty to refrain from injuring another's interests. It should inculcate the culture of respect of another person's right for a peaceful co-existence. Everybody should feel obliged to exercise the required self-restraint. Nobody should claim the entitlement to enjoy the advantages of the system without fulfilling his/her obligation of refraining from infringing upon other people's right.