

CR 13/10

TO: THE CONSTITUTIONAL REVIEW COMMITTEE

SUBJECT : REVIEWING OF SPECIFIC SECTIONS OF THE CONSTITUTION

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

1.1 BACKGROUND AND DISCUSSION

Some social ills have forced the government to embark on a mammoth task moral regeneration. This is after we as the public witnessed the social conduct that was never seen before, when we witnessed the ever increasing incidents of teenagers having their own children whom they could not support and the increase of the backyard abortion.

On Thursday 30 May 2013, the argument was heard in the Constitutional Court on the consensual sexual conduct by children between the ages of 12 and 16 that the conduct should not be criminalised. It looks like the law is contradicting itself in that, in terms of the Sexual Offences Act, having sexual intercourse with a person under the age of 16, the perpetrator commits an offence known as the Statutory Rape. On the other side, we are told that a 12 year old girl can terminate her pregnancy without the consent or consulting with her parents. If the Constitutional Court decriminalise the sexual conduct by the teenagers, does it mean the offence of Statutory Rape now falls away? What is the constitutionality of allowing the children to engage in irresponsible and dangerous sexual conduct?

In my view, the clause " South Africa belongs to all who live in it" is flawed in that, it gives the foreign nationals automatic right to claim the ownership of the land. This is why the foreigners are striving so hard to land on the South African soil because they know that once they land, they are guaranteed the right to land. South Africa should belong to South Africans only and anyone else who gets into the country should be treated in terms of the already existing laws, ie, Immigration Act. Foreign nationals, including the asylum seekers should not be granted the citizenship merely on the basis of them getting married to the South African ladies.

2. 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. Our laws lack the deterrent effect. People just do as they wish or think. Our laws are rather reactive

in the sense that they allow the occurrence of crime and the correctness or wrongfulness of the act is proved long after the incident and in the process, the poor, law abiding citizen is bearing the brunt. Our laws are criminal-friendly and I feel that they need to be reviewed if we are to see the decrease in criminal activities.

3. Children's Rights

Section 28 (g) creates the impression that a criminal conduct by minors or teenagers is not a real crime yet there are victims. 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.

4. 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.

5. 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 to prove their innocence.

(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 implicated, s/he shall of course be released.

(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. It stands to reason that in most cases, the suspects are the important source of incriminating evidence like fingerprints, body samples and physical evidence found in possession of suspects would be unobtainable.

(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 defense as it compromises the victim/complainant who in turn would still have to be grilled by the defense 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 to establish the truthfulness of such admission/confession and if it indeed leads to successful prosecution, we shall all say justice has been done. I fail to understand why/ how can the illiterate, youthful and mentally handicapped suspects be classified as the weaker suspects who are vulnerable to unreasonable interviewing while they themselves have proved to be fit to commit a crime like rape. It is always the weaker and the vulnerables who are the actual victims of crime.

6. 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 serve the potential criminals well to pronounce the immediate automatic forfeiture / suspension of the transgressor's constitutional rights.

7. CONCLUSION

The Constitution should put more efforts in ensuring that everybody carries out the personal responsibility 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 own obligation of refraining from infringing upon other people's rights.

8. ORAL PRESENTATION

9. I am prepared to come to do oral presentation if I am required to do so.

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