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END CONSCRIPTION COMMITTEE

IN RE:

EMERGENCY REGULATIONS, JUNE 1986

O P I N I O N

1. The END CONSCRIPTION COMMITTEE ("the ECC") is a voluntary association which was formed to oppose the system of compulsory military conscription in South Africa and to urge the adoption of alternatives. The emergency regulations

promulgated on 12 June 1986 (GG 10279) appear to have been drafted in part with the activities of the ECC particularly in mind. Regulation 10 prohibits the making, possession or dissemination of what are called "subversive statements". "Statement" is defined by Regulation 1 (vii) to mean also any publication, while "subversive statement" -

> " means a statement which contains anything which is calculated to have the effect or is likely to have the effect -
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> ...
>
> (b) of inciting the public or any person or category of persons to -
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> ...
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> (v) discredit or undermine the system of compulsory military service".

2. The principal question which has arisen is the extent to which the provision just quoted affects the ECC's activities. However, other portions of the definition of "subversive statement" are also relevant. By Regulation 1 (viii)(c), "subversive statement" is defined to include a statement which contains anything which is calculated to have the effect or is likely to have the effect -

" (c) of inciting the public or any section of the public or any person or category of persons to resist or oppose the Government or any ... official ... in connection with any measure adopted in terms of any of these Regulations or in connection with any other measure relating to the safety of the public or the maintenance of public order or in connection with the administration of justice".

Moreover, Regulation 1(viii)(e) defines "subversive statement" to include a statement which contains anything which is calculated to have the effect or is likely to have the effect -

" (e) of weakening or undermining the confidence of the public or any section of the public in the termination of the state of emergency ... "

3. Before the effect of these provisions is considered, it is important to emphasize this. This opinion deals only with the possibility of the conviction of any member or officer of the ECC under Regulation 10 for making a subversive statement. In that regard, I have already had two consultations with my instructing attorney and with an office-bearer of the ECC and have given certain advice (which will be set out below) and which indicates that the regulations still leave the ECC a fairly substantial margin of leeway within which to operate.

4. But that unfortunately does not mean that the ECC or its officers may not suffer severely from action taken under the Regulations or purportedly taken under them.

4.1 Firstly, it need barely be said that the regulations confer an awesome power on any member of the security forces, who may (in terms of Regulation 3(1)) "without warrant ... arrest ... any person whose detention is, in the opinion of such member, necessary for the maintenance of public order or the safety of the public ... or for the termination of the state of emergency". It is therefore possible that this almost arbitrary power of arrest will be used against the ECC and its members and office-bearers.

4.2 Furthermore, it is possible that the Government's advisers may come to a conclusion about the ambit of these regulations which differs from the views expressed in this opinion. It is therefore an additional possibility that members of the ECC may be arrested for an alleged contravention of Regulation 10 though in the end they may be found not guilty of the charge.

5. As I have indicated, the chief provision of importance to the ECC is the definition contained in Regulation 1 (viii)(b)(v). The most important feature of this provision is that it does not (contrary to the impression widely gained) make it an offence to "discredit or undermine the system of compulsory military service"; it is only an offence to make a statement containing anything which is likely to have the effect of inciting any person to discredit or undermine that system. This distinction must be of great importance to the ECC. It is in my view highly unlikely that a court will take the view that every statement which discredits or undermines the system of compulsory military service necessarily also is likely to have the effect of inciting someone else to discredit or undermine that system. If the lawmaker had intended to achieve that effect in the Regulations, it could simply have said so.

6. Accordingly, meaning must be given to the limitation of criminalization to those statements which have the likely effect of inciting any person to engage in the relevant activity. It therefore follows, in my view, that there must be a category of statements which, while having the effect of discrediting or undermining the system of compulsory military service, nonetheless do not

amount to incitement to take part in such activities.

7. The crucial test, then, which the ECC must apply in respect of every one of its statements and publications is whether it is likely to have the effect of inciting any person (or the public or any category of persons) to discredit or undermine the system of compulsory military service. In S v Nkosiyana and another 1966 (4) SA 655 (A) at 658, the Appellate Division stated that "in criminal law, an inciter is one who reaches and seeks to influence the mind of another to the commission of a crime." The judgment continues:

> " The machinations of criminal ingenuity being legion, the approach to the other's mind may take various forms, such as suggestion, proposal, request, exhortation, gesture, argument, persuasion, inducement, goading, or the arousal of cupidity. The list is not exhaustive. The means employed are of secondary importance; the decisive question in each case is whether the accused reached and sought to influence the mind of the other person towards the commission of a crime."

8. In Nkosiyana's case, the Appellate Division was concerned with a statutory provision which rendered

it an offence to incite another to the commission of a crime. Here, of course, merely to discredit or undermine the system of compulsory military service is not a crime but under the Regulations incitement to commit one of those actions is a crime; and the quoted words from Nkosiyana's judgment should be read subject to this gloss. Burchell & Hunt South African Criminal Law and Procedure Vol 1 General Principles of Criminal Law (2 ed, 1983) p 473, state:

> " An inciter is one who unlawfully makes a communication to another with the intention of influencing him to commit a crime."

It should be assumed, in my view, that Nkosiyana's definition as recast by Burchell & Hunt will be regarded as authoritative by any court which tries an alleged contravention of Regulation 10. It follows that, for our purposes, an inciter is one who unlawfully makes a communication to another with the intention of influencing him to discredit or undermine the system of compulsory military service.

9. Various important points must be made about Regulation 1(viii)(b)(v):

9.1 The test here, as with sub-paragraphs (c) and (e), is objective: a statement is "subversive" provided it contains anything which is "likely" to have one of the listed effects. Intention to incite is not required.

9.2 As emerges from Burchell & Hunt's definition of incitement, a communication must occur. Unpublished material or uncommunicated statements cannot be subversive.

9.3 The likely effect of the statement must be that it will incite someone to perform to do something. This aspect is of the greatest importance. Merely inciting someone to adopt a particular view or to come to a certain conclusion is in my view insufficient. It follows that to incite someone to hold the view that the system of compulsory military service in South Africa is iniquitous and immoral will not contravene the regulations. The person (or the public or the category of persons) must be incited to "discredit or undermine" the system of compulsory service. In other words, the likely

effect of the statement must be that it will incite someone to do something more than merely adopting a certain point of view; and that "something more" must in my view amount to a positive act discrediting or undermining the system in question.

9.4 It is to be noted that it is only "the system of compulsory military service" which is the object of the discrediting or undermining; if anything else is involved, no offence occurs.

10. A similar construction to that in paragraph 9.3 above should, it seems to me, be placed on the definition contained in Regulation 1(viii)(c). There (as will be recalled) the definition embraces a statement which contains anything which is likely to have the effect of inciting any person "to resist or oppose the Government" and so on. Here again it seems to me to be important that inciting anyone to hold a certain view is not enough. The person concerned (Burchell and Hunt choose to call him or her "the incitee") must be incited to "resist or oppose" and this in my view requires incitement to an act of resistance or opposition. Incitement to the adoption of views, even where

those views might be described as views of resistance or opposition, will not be enough.

11. The above analysis seems to me to follow from the general principle of the criminal law that a strict construction should be place upon enactments creating crimes. Regulation 1(viii)(c) can in my view conceivably be interpreted so as to embrace incitement merely to the adoption of views of resistance or opposition; but in my view it is unlikely that any court would construe the provision in that way. It seems to me that "to resist or oppose", in its context, clearly envisages some act of resistance or opposition and the likely incitement will be confined to that.

12. It follows, in my view, that the ECC still has (subject to the caution expressed earlier about liability to arbitrary action) a wide ambit of legitimate activity left to it. Self-evidently, the ECC should be at exceptional pains to avoid putting out anything which is likely to have the effect of inciting someone to discredit or undermine compulsory military service or to resist or oppose any Government official or any security force member. But, subject to this caution, a wide range of the ECC's current activities still seem to me to be capable of legitimate continuation.

13. Criticism of Compulsory Military Service:

Cautiously worded statements which criticize compulsory military service seem to me still to be lawful, provided (obviously) that they do not have the likely effect of inciting anyone to discredit or undermine that system. The line is very fine and it is impossible in this opinion, which is necessarily abstract, to draw it with any precision. But if the views I have set out above are correct, and on the basis of the approach adopted in Nkosiyana's case and in Burchell and Hunt, it seems to me that criticism of the defence force will be unlawful only if it has the likely effect of "influencing" someone to commit an act which will discredit or undermine the system of compulsory military service.

14. The above advice must obviously be read subject to the extreme sensitivity of the ECC's tactical position. This was discussed at length in the consultations I have referred to. The ECC will have to, in the words of the cliché, "test the water" very carefully indeed and advance gradually as it seems safe to do. However, as this opinion is being dictated, Government officials are giving increasingly severe warnings to the Press and to other persons that the Emergency Regulations will be severely enforced. This underlines the danger

of arbitrary arrest even though a subsequent criminal prosecution may not succeed.

It therefore may be safer for the ECC initially to confine itself to those activities which we discussed during the consultations and which I now refer to briefly.

15. The ECC's name: As I indicated, it seems inconceivable to me that the mere name "End Conscription Committee" can constitute a likely incitement to anyone to discredit or undermine the system of compulsory military service. It is true, of course, that the words "end conscription" do constitute, in a sense, a summons to action and in this sense there is an exhortation to do something which may undermine the system of compulsory military service. But, as Holmes JA indicated in the Nkosiyana case, much will depend on the context. A clarion call from a public platform, "End conscription!", will clearly be an incitement to do something to undermine the system of compulsory service. But the name is in my view safe. It has been in use for some years now and serves more as a title for the campaign than a call to action.

16. Criticism of the existing system of alternative service: The Defence Act, 44 of 1957 provides in sections 72A to 72I for the classification of persons allotted in terms of section 67 of the Defence Act as religious objectors in one of three categories. Section 72E, headed "Service by Classified Religious Objectors", specifies how the religious objectors placed into one of the three categories have to "render service". What is important is that all religious objectors are required in terms of the Defence Act to "render service". It therefore seems to me that to suggest an extension of the provisions of sections 72A to 72I to include the rendition of "service" in terms of the Defence Act in an alternative manner by persons other than the religious objectors cannot be categorized as discrediting or undermining "the system of compulsory military service" - even if the requirement of incitement is left to one side for a moment.

It should be borne in mind, however, that religious objectors classified in the third category (section 72D(1)(a)(iii)) are referred to in the Act as rendering "community service" and not military service. From this it would seem to follow that this third group does not form part of "the system of compulsory military service" and that a

suggestion that the system of alternative service be extended beyond its current confines could be held to "discredit or undermine" the system of compulsory military service. The incitement requirement will, however, remain and what I have said above about criticism of the role of the military in general applies also here. Therefore, criticism of the existing system of alternative service as being too narrow (for instance) will not fall foul of the regulations unless it has the likely effect of inciting someone to discredit or undermine the system of military service.

17. Questionnaire: The ECC wishes to ascertain people's views as to the role of the military by circulating a questionnaire and analysing the response. I have been given a copy of this questionnaire, the heading of which is "Conscription Survey" and the introduction to which reads as follows:

> " At present anyone who has not done military service is required to complete:
>
> - a total of four years' service, two of which are continuous, and two years in camps;
>
> OR

- alternative service which is a continuous six years in a Government department usually at a private's salary.

This is available only to religious pacifists. Those who do not qualify face six years in jail or exile."

18. Before commenting on the questions in this document, it should be said that this exposition is not entirely accurate. There are at least three points.

18.1 Firstly, the exposition suggests that the only alternative to four years' service is non-military service for six years "in a Government department". This is not correct. The Act creates three categories in section 72D(1) and only the third category is reflected in the ECC exposition.

18.2 Secondly, I do not know what "a private's salary" is nowadays, but my own knowledge indicates that the allowances paid to total religious objectors amount to considerably more than what a private would receive.

18.3 Finally, a point arising from 18.1 above: It is not correct that the alternatives are available "only to religious pacifists". Lesser categories of objectors are accommodated in section 72D(1)(a)(i) and (ii).

19. These points may be relatively trifling. Moreover, the object in a questionnaire is to obtain a broad indication of people's views to major issues and not to overwhelm them with minutiae. This I realize. However, in these black times, I have no doubt whatsoever that the ECC should be scrupulous and if necessary over-scrupulous to avoid criticism of anything it puts out. The introduction to the questionnaire will therefore not do.

20. The questions are as follows:

" 1. Should residents of South Africa be obliged to render service to this country in some way?

2. Should men have the choice whether to serve South Africa in the SA Defence Force in some other way?

3. Should alternative service be available to all those who choose not to go to the SADF?

4. Should soldiers have the choice whether or not to go into the townships?
5. Are you liable for military service?
6. Have you done your initial two years' service?
7. Have you heard of the End Conscription Campaign?
8. The End Conscription Campaign proposes that conscripts should have the right to choose whether or not to serve in the SADF: do you support this proposal?"

The remaining portions of the questionnaire consist of details about the "informant" (as the ECC chooses to call the interviewee) and spaces in which the answers can be recorded.

21. It is notorious that questions can be phrased so as to suggest the answer the questioner wishes to elicit. It is therefore possible that certain of the above questions could constitute an incitement to discredit or undermine "the system of compulsory military service". I have carefully considered the eight questions recorded in the questionnaire and it does not seem to me that they can be construed as being so suggestive that they are likely to incite anyone to an act of discrediting or undermining. Question 8 provides the obvious difficulty. There is no doubt that the

fact that the ECC "proposes" a right of choice about service in the SADF constitutes a discrediting or undermining of the system of compulsory military service. But, in keeping with the line adopted throughout this opinion, I am unable to see how the communication to an "informant" of the information that the ECC so "proposes" can constitute an incitement to discredit or undermine. Moreover, I am unable to see how the simple question whether the "informant" supports this position can be such an incitement.

To be excessively cautious, the very last question could be rephrased to contain within in both alternative answers: "Do you or do you not support this proposal?"

23. But there are two further and, in my view, insuperable difficulties:

23.1 It seems to me that merely <u>asking questions</u> about the system of compulsory military service may undermine it. That is surely the very premise upon which the ECC was founded. By communicating views to people and by stimulating debate and discussion, it must have been hoped to create a public climate in which the adoption of

alternative forms of service became possible. That certainly would undermine the system of compulsory military service.

It follows in my view that to request any person to go around the city or the country asking these questions of people probably constitutes an incitement to the questioner to discredit or undermine. If the questioner, by asking questions, is discrediting the system of compulsory military service, then any act which (in the Nkosiyana formula) "influences" another to perform that discrediting act, constitutes an incitement.

Accordingly, it seems to me that, not the persons answering the questions, nor those asking the questions (who are mere "underminers"), but the persons organizing the questionnaire and arranging for its distribution run the risk of being found guilty of incitement to discredit or undermine.

23.2 There is a further aspect. This concerns the results of the survey. It seems to me that publication of the survey's results

may well be held to constitute an incitement to discredit or undermine. I would go so far as to say that only if the results of this survey show overwhelming public support for the system of compulsory military service will publication not amount to an incitement to discredit or undermine. It should be remembered in this regard that the objective criterion is merely that the act "is likely to have the effect" of inciting someone to discredit or undermine. If, therefore, there is a likelihood that public knowledge that a significant sector of the population is opposed to the system of compulsory military service will incite someone to discredit or undermine that system, then the offence will be constituted.

24. The ECC propose to criticize the system of <u>school cadets</u>. The Defence Act, 44 of 1957 contains various provisions which establish a Cadet Corps (section 56) and which subject scholars and students to liability for service as cadets (section 57). This liability is subject, however, to written objection by a parent or guardian and to exemption on other grounds.

25. The question is whether the fact that Cadet Corps are established and organized under the Defence Act and that liability for service as a cadet is enshrined in the Defence Act makes the system of cadets part of the "system of compulsory military service". The Defence Act should be read as a whole and it follows that the system of school cadets certainly constitutes part of the system of defence of the country. In my view, however, it does not follow that the cadet system is therefore part of "the system of compulsory military service". It therefore seems to me that criticism of cadets at school does not constitute criticism of the system of compulsory military service. That criticism should, however, be so phrased as not to amount to an incitement to discredit or undermine the system of compulsory military service.

26. It follows from what I have just said that, whether or not the system of school cadets is part of "the system of compulsory military service", it is possible that criticism of the cadet system could, indirectly, amount to an incitement to discredit or undermine the compulsory military service system. Each statement which the ECC proposes to put out will have to be very carefully scrutinized. But my overall view is that the school cadet system, subject to the caution I have expressed, will

constitute a constructive and legitimate focus of the ECC's criticisms.

CONCLUSION

19. I accordingly conclude that a substantial area of legitimate activity is left open to the ECC by the emergency regulations of 12 June 1986; but this advice concerns only the question of contravention of the criminal provisions of the regulations. Arbitrary action against the ECC remains possible and the possibility that it will follow the publication of any statement published by the ECC in pursuance of the advice given in this opinion cannot be ignored.

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