

END CONSCRIPTION CAMPAIGNEMERGENCY REGULATIONS, DECEMBER 1986OPINION

1. The END CONSCRIPTION CAMPAIGN ("the ECC") is a voluntary association which was formed in order to call for the change in laws regarding compulsory military conscription in South Africa. The ECC has been campaigning for the introduction of non-military forms of national service, which is presently only available to religious pacifists.

The Emergency regulations promulgated in June and December 1986 have both affected the activities of the ECC.

- 1.1 Under the June regulation, Regulation 1(vii)^b(~~a~~) defines a "subversive statement" as a statement which contains anything which is calculated to have the effect or is likely to have the effect -

(b) of inciting the public or any person or category of persons to -

(v) discredit or undermine the system of compulsory military service.

- 1.2 Under the December regulations, Regulation 1(1)(b) a subversive statement is defined as a statement -

(b) by which the system of compulsory military service is discredited or undermined.

- 1.3 The omission of the introductory portions of the abovementioned June definition in the December regulations in effect means that one now no longer needs to induce another person, through such a statement, to commit an act that would undermine conscription - to commit an offence. Under the amended regulations one would simply have to commit such an act through the making of such a statement to contravene the regulations.
 - 1.4 The meaning of the new definition is certainly clearer and more certain than that of the old definition.
2. The regulation must be clear, in its meaning reasonable and intra vires the enabling statute, the Public Safety Act No. 3 of 1953.
- 2.1 The State President's powers to make regulations are to be found in Section 3(1)(a) of the Act. It empowers him to make such regulations "as appear to him to be necessary or expedient for
 - the safety of the public or
 - the maintenance of public order and for
 - making adequate provision for terminating such emergency or
 - for dealing with any circumstances which in his opinion have arisen or are likely to arise as a result of such emergency."

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The powers conferred upon the State President by Parliament are very wide indeed, but they are nevertheless subordinate delegated powers which may only be exercised subject to the constraints expressly or implied imposed in the enabling Act. There is thus room for judicial scrutiny.

2.2 The State President must therefore stay within the four corners of the matters in which he was authorised by the statute to make regulations. If he does not, he has gone beyond his powers and has acted ultra vires.

2.3 This is obviously a matter of interpretation. If the subject matter of the regulation, on a fair interpretation of both the empowering section and the regulation, is capable of being directly related to the powers, the regulation cannot be condemned as travelling beyond what appears to the State President to be necessary or expedient. In that event the regulation will stand, although what is done pursuant to the regulation may still be found to be objectionable. Also, where criminal sanctions apply, it will always be open to an accused who is prosecuted to show that the activity with which he is charged falls outside the scope of the definition of subversive statement.

2.4 To reiterate then, whether or not the regulation is intra vires or not depends firstly

- on the scope and terms of the enabling section and secondly
- on whether the subject matter of the regulation is authorised by these terms.

The State President must limit himself to objects which have a bearing on public safety, or the maintenance of public order or any other matter referred to in the empowering section.

3. In view of the above is Regulation 1(1)(b) ultra vires or intra vires? Is the subject matter of this regulation authorised by the terms and scope of the enabling section?

3.1 As elaborated above the terms of the enabling section cover 4 areas.

3.1.1 The State President is empowered to make regulations as appear to him to be necessary or expedient for dealing with any circumstances which in his opinion have arisen or are likely to arise as a result of such emergency.

The call to end the system of compulsory military service is not a "circumstance" which arose as a result of the emergency. This issue has been around for many years, long before the current emergency was ever contemplated. That it could arise is dealt with hereinafter

3.1.2 The State President may make adequate provision for the terminating of the emergency.

In order to achieve this end he would have to provide for adequate means to tackle:-

- (a) the very problems or issues that caused the emergency to be declared in the first place;
- (b) anything that causes the continued existence of the same problems.

Provided of course that any other issue does not affect the

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other 3 terms of the section, the State President may not include another issue that would not fall under the scope of (a) and (b) above, no matter how disturbing he believed the issue to be.

I submit that the problems that caused the State President to declare the State of Emergency was the general breakdown of law and order, and the widespread destruction of life and property that occurred in many areas of the Republic. This is prevalent in so-called "non-white" areas.

One needs to enquire whether the call to end conscription has contributed to the problems as experienced above. I am of the view that it has not affected such problems. Only whites face conscription and consequently those involved in making such calls only work in the white areas.

Secondly, has the making of such statements, or would the making of such statements contribute to the continued existence of the abovementioned problems. The reasons for their continued existence are many and varied but do not include this issue. There is not a single example of anyone resorting to violence with the specific aim in mind of ending conscription. Nor could it be argued in my view that the call to end conscription has so divided the military that one part of it has taken up arms against the other part or parts.

The argument that by undermining the system of compulsory military conscription one will induce people not to go to the SADF, thereby endangering public safety is not a valid one. If it in fact discredits military service in the SADF to the

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The argument that by undermining the system of compulsory military conscription one will induce people not to go to the SADF, thereby endangering public safety is not a valid one. If it in fact discredits military service in the SADF to the point where it directly persuades someone not to go to the SADF, than this is an offence which has already been provided for by the Defence Act. Where the ordinary law of the land can deal adequately with problems - then that is the law which must be used. Extraordinary powers such as the Emergency powers can only be promulgated when the ordinary law is of no use in handling the situation. The call to end conscription is clearly to do just that, and not to get people to evade being drafted. If that in fact was the aim and effect of the End Conscription Campaign, then its activists would surely have been charged and convicted of transgressions of the Defence Act years ago.

In any event such a reason cannot exist, as the government has stated on numerous occasions that it is only a tiny negligible minority of conscripts who have in fact evaded. This is borne out by the fact that there is not a single person presently serving any sentence for refusing to serve in the SADF on the grounds of political and moral objections.

3.1.3 The safety of the public order or the maintenance of public order.

I submit that only in the event of those calling for an end to conscription involve themselves in activities that would prejudice the safety of the public or the maintenance of public order, such as the use of violence and destruction of property, would such activities fall within the scope of this term of the enabling section.

Examples of activities that have been used in the call

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to end conscription include:-

- public debates, meetings, forums and seminars;
- letters to the press;
- letters to Members of Parliament;
- distribution of pamphlets and stickers;
- church services;
- fasts;
- use of art, music and drama;
- activities organised to show the viable alternative of a non-military form of national services e.g.
 - building a creche;
 - clearing rubble from parks and playing fields;
 - decorating hospital awards;
 - assisting in irrigation schemes;
 - clearing litter from nature and forest reserves;
 - organising Sunday picnics for disadvantaged children.

None of these activities can possibly be seen as prejudicing public safety or the maintenance of public order.

I submit then that discrediting or undermining the system of compulsory military service would only fall within the scope of the enabling section when the statements used in promoting this end, prejudice the safety of the public or the maintenance of public order by calling on people to use violence or disorder to achieve the dismantling of the system of compulsory military conscription. If such

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*Statements can be
fairly*

interpreted as persuading people not to obey their call
ups then such transgression should be dealt with in terms
of the Defence Act and not the Public Safety Act.

4. The State President has therefore in making this regulation not limited himself to objects which have a bearing on public safety, or the maintenance of public order or any other matter referred to in the empowering section. The regulation is consequently ultra vires.

Such an argument can be used in an application to the Supreme Court to have Regulation 1(1)(b) set aside, or it can be used as a defence for those prosecuted on subversive charges in terms of the emergency.

5. In interpreting the Regulations regard should be had to the following Oxford dictionary definitions of the words "discredit" and "undermine":

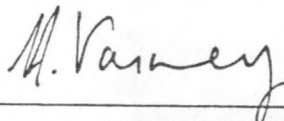
discredit - bring disrepute to
- cause to be disbelieved
- doubt
- lack of credibility
- shameful.

undermine - wear away base or foundation of
- injure person, reputation, influence by secret or insidious means
- weaken, wear-out imperceptibly.

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It may well be that criticism albeit robust and intemperate may still not amount to "discrediting" or undermining conscription.

I conclude that with the existence of this regulation there is still a substantial area of legitimate activity left open to the ECC. However, the central aim of the organization, that of opposing military conscription has at this point been effectively closed. This avenue will only be opened through Supreme Court action as described above or, with, the lifting of the emergency. General "peace" type campaigns are still permissible, as is the "cadet" issue, so long of course as such campaigns do not undermine or discredit compulsory military conscription. "Troops Out" campaigns are also legal unless they undermine conscription, and unless Divisional Police Commissioners have made orders prohibiting such calls.



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