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MCH91-92-7-4

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9 October 1990

Geoff Schreiner
The Co-ordinator/Secretary
LRA Committee of COSATU / COSATU Workers Charter Committee
COSATU

Dear Comrade,

Re: MEETING - LABOUR COMMISSION - LEGAL AND CONSTITUTIONAL COMMITTEE OF THE AFRICAN NATIONAL CONGRESS

The Legal and Constitutional Committee was established two years ago by the ANC's NEC to explore constitutional questions and to inform the NEC in regard to these issues. This year, in response to the political developments following 2 February, the Committee established nine commissions to explore select issues or sectoral interests. One of those commissions is the Labour Commission. Committee members Fink Haysom, Louis Skweyiya and Kadir Asmal sit on this Commission. In addition, Halton Cheadle has agreed to act as a consultant.

The Committee has not yet met in full. However, Halton and I have prepared a preliminary report on what are potentially Labour's immediate or direct interests in the Constitution. I enclose a copy for your attention. The report is not that of the whole Committee nor that of the ANC, nor, as is spelt out, that of COSATU. It is a starting point for discussion. It expresses the view that COSATU should (a) be involved in structured discussions over constitutional issues (including such issues as a bill of rights and the structure of government) and (b) be encouraged, notwithstanding the above, to develop its own demands, and, further, that there is an urgent need to put written proposals up for discussion.

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The opinion has been repeatedly expressed that all our members, formations and allies should be involved in any constitution-making process. We would like to arrange a mutually convenient date for a meeting to discuss both the enclosed document as well as other constitutional issues, e.g. economic rights.

Could you, please, forward this request to any relevant structures (a copy will be sent to Jay) and also contact me to set up a meeting - if COSATU and your committee agrees. This letter is sent to you, as Halton believes your committee has been charged with the task of dealing with these issues.

Best regards

Fink.

FINK HAYSOM

cc: Jay Naidoo

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AS/mem

20 May 1991
Per Telefax

Ronald Dworkin
Fax No 071-730-6505

Dear Ronald

Thank you for your wonderfully pertinent and helpful letter of 12 May. We are in fact working on a second draft of the Bill of Rights so your comments have come just at the right time.

Last week we had a workshop attended mainly by our members but with a good sprinkling of academics. The two main issues were how to strengthen claims to the land as a human right and how to make second generation rights enforceable. The result is that we are having a fresh look at the question on property and will probably have a special clause dealing with rights to land and a separate one dealing with other forms of property.

Our biggest headache at the moment is to find an appropriate form for including social and economic rights. Our members simply cannot see how rights to education and health can be any less fundamental than rights of free speech. They want something stronger than exhortation or mere directives of State policy as in Ireland, India and Namibia. I think the answer is to spell out more clearly the special and unqualified role of the courts in protecting generation rights and then have a separate section with a separate mode of enforcement (with the courts always in the background) in relation to second generation rights. I will keep you informed of our thinking on this question. Mandela gave a lovely speech at the workshop, strongly re-affirming the ANC support for a Bill of Rights, and repeating the statement that we do not want Freedom without Bread or Bread without Freedom but Freedom and Bread.

I took your point about derogation. Ours is such an authoriterean society as well as a racist one that we can only gain by reference to open and democratic societies. We would like to compel our Legislators and Judges to refer to Constitutions Statutes in "ODS's". Even the lowest communication demoninator would represent a huge advance for us. We cannot leave it to the Judges as your Bill of Rights does. It would be too open and not sufficiently democratic.

The/....

The new Judiciary will have to establish itself before sensitive questions relating to exceptions could be left entirely to their good sense, however, we will look again at the whole question of derogation, bearing in mind your valuable observations. One cannot be too careful, as I say in the paper I am sending to you by separate post, all Constitutions are based on mistrust.

I cannot overdo saying how helpful it is being in touch with you on the subject of our Bill of Rights. I am not sure when the appropriate moment will arrive for you to visit us and consult directly. We will give you as much notice as possible. Things move quickly, and then slowly, making it difficult to plan.

With warm good wishes to yourself and Betsy.

Yours sincerely

ALBIE SACHS

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30 April 1992.

Adv A Chaskalson
Legal Resources Centre
National Office
Po Box 9495
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Dear Adv Chaskalson

This a somewhat presumptuous letter in that it presumes that I have a contribution to make on issues on which my views have not been sought.

I am however writing to you informally in your capacity as a member of the ANC's constitutional team. The purpose of this letter is to draw attention to some issues which I believe may be relevant to the constitution drafting process which do not appear to have been raised in the various ANC drafts and memoranda which I have seen or the Reports of the Law Commission. They all concern issues which came to my attention while working in Namibia and during the further training in constitutional litigation which I have been fortunate to have received with the ACLU and Interights (where I have been working on cases brought under the European Convention on Human Rights). Whether there is indeed an awareness of the issues I raise I do not know. If this is so I apologise for wasting your time. As regards their relevance I leave this to you to determine, which is why I write to you informally instead of to the address the ANC provides for comments on its draft. Should you feel that there is material in here of use then I leave it to you to decide how it could best be used. I'm writing this now as my internship programme is about to end and thought it best to put these things down on paper while they are still fresh in my mind.

<u>The International Law of Human Rights and Constitutional Choices to Be Made Regarding its Domestic Effect</u>

Although questions regarding the domestic effect of the international law of human rights (henceforth "ILHR") raise questions about the effect of international law generally I confine what I have to say to the area of the ILHR.

I knew next to nothing about this subject when I left SA. For obvious reasons SA courts were not in the habit of invoking international human rights norms as the subject was largely irrelevant in that in domestic courts the subject usually only arises in the context of interpretations of bills of rights. It

is however the body of laws relied on by a vast network of lawyers working in UN and other international agencies and NGO's, but as we have not been part of the world during the period in which the ILHR has grown most rapidly these developments appear to have passed us by. Both here and in the USA I have however seen its value as a tool for the advancement of rights in domestic courts. In theory, where the domestic bill of rights creates a wider category of rights than exist in international law (which will be the case with the SA bill) recourse to the ILHR should be unnecessary as the time it takes for rights to be recognised as enjoying sufficient international recognition to enjoy the status of international law is lengthy. Where the local judiciary has not been particularly progressive in its constitutional interpretations of some provisions or, even more crucially, where a local legislature with a sufficient majority has sought to water down the bill of rights to enhance their powers, the domestic status of the ILHR can be of great importance. As regards the former, from an examination of some of the cases that have come before the European Court of Human Rights it becomes easy to see how even in the context of the "advanced nations" history, domestic legal idiosyncrasies and political parochialism in some matters can all contribute towards the creation of a state of affairs where the domestic law becomes stuck in its refusal to allow for the advancement of a particular right and but for the fact of that country's obligations under international law the advancement of some important human rights would be impossible or at least substantially delayed. (The UK and Switzerland are prime examples of countries where reactionary and often archaic laws which the local judiciary, having been nurtured on these laws, would not of their volition dispense with have only been removed as a consequence of the application of international law.)

SA currently follows the dualist view, in terms of which international law is inferior in status to domestic law. (see Nduli & AN v Minister of Justice & Others 1978 (1) 893 (A) at 906; Binga v A-G SWA 1984 (3) 949 (SWA) at 967.) If the new constitution does not alter this position then (with certain exceptions that may arise from treaty obligations), should SAn law conflict with ILHR the courts would have to follow domestic law. On the other hand, if the monist view were adopted a SAn court would be obliged to give effect to international law.

The practical significance of the difference is apparent if one looks at recent developments in Zimbabwe where the Government has legislated to weaken the bill of rights. (Events in Zimbabwe also provide a good example of the value of following the Namibian model of 100% entrenchment of fundamental rights) The amendment which ousts the jurisdiction of the courts to question the fairness of the compensation for expropriated property is incompatible with the IHLR. (See, Naldi, Constitutional Developments in Zimbabwe and their Compatibility with International Human Rights, 3 RADIC (1991).) Under the monist system the ZSC could strike down this amendment. Under the dualist system it cannot. (It can obviously still have reference to the ILHR and comparative law as a guide to interpretation, but

this is a different issue.)

Art 143 of the Namibian Constitution read with Art 96(d) reflect the retention of a dualist approach. While I am not competent to comment on what approach is advisable in the new constitution as regards international law generally I do think that there is a lot to gain from inserting a provision which states that to the extent that SAn law is incompatible with the ILHR the latter shall prevail. Such a provision would also generally raise the status of this body of laws and thus allow lawyers to more easily refer to the decisions of authoritative international tribunals without being asked what relevance the opinions expressed have to the matter at hand.(As often happens in the UK which, in line with its approach to most things which are seen to weaken parliamentary sovereignty, has gone out of its way to limit the influence of int. law. In my view parliamentary sovereignty is a however a misplaced concept in the context of human rights as human rights are universal rights which theoretically flow from the fact that you are a human being and thus do not derive their legitimacy from the fact that a sovereign parliament has decided to confer them on its citizens.) From the papers presented to the Judicial Colloquium in Harare which you spoke at you would probably also have noted how the ILHR has been of use to judges in many Commonwealth countries.

International Law - Refugees

A related subject is the timing of SA's ratification of the numerous international treaties that exist to protect human rights. Here I want only to refer to the Convention relating to the Status of Refugees of 1951 and the Protocol of 1967 and briefly describe what happened in Namibia as a consequence of the fact that the Convention did not come into force simultaneously with the Constitution.

After independence a number of refugees fleeing other African countries entered Namibia. As would be expected there was a mix of economic and political refugees. At the time the UNHCR still had an office in Windhoek and their representative duly interviewed claimants of political asylum and in a few cases advised the Govt. that the applicants had a well founded fear of persecution should they be returned to their countries of origin and should accordingly be granted asylum in Namibia.

TO the UNHCR's surprise the Govt. rejected their recommendations and at this stage the LAC were asked to make representations to the Govt. To cut a long story short it transpired that the reasons underlying the Govt's approach had a lot to do with the fact the newly appointed Permanent Secretary for Home Affairs held the view that political refugees were only people who were bona fide members of liberation movements and that all those who had entered after independence had only come 'to steal our gold and diamonds.'

Art 97 accepted as one of the principles of state policy the well founded fear test. Art 11(4) of the Bill of Rights provided that

no deportations could occur unless a tribunal empowered by law (no such tribunal existed at the time) to give such authority had authorized it. In the middle of what appeared to be discussions concerning the fate of our clients we were advised by the UNHCR late one afternoon that a Malawian (who was a Soviet educated opposition member) was to be deported to Malawi on the following day.

After attempts to persuade the bureaucracy that their action was illegal failed an urgent application was set down for late that night and the deportation order was eventually withdrawn an hour before the hearing. As you might imagine the UNHCR who had assisted SWAPO for three decades were not overly impressed.

Subsequent to this case it took a few months to get any of the asylum seekers released from jail. The general legal problem which had been the cause of a lot of the problems which had arisen was that although the Constitution provided an abstract framework allowing for the acceptance of international refugee law the law was silent on the actual procedures to be adopted and on the issue of specific rights which attach to asylum seekers which is dealt with in the Convention or in domestic legislation which conforms with the Convention. The refugees thus found themselves subject to bureaucratic whim. A lot of the problems and suffering of individuals could have been avoided if the Convention (which Namibia intended to sign at some or other time) had been adopted simultaneously with the Constitution.

As far as I'm aware SA already has a 'refugee problem' on its border with Mozambique. If a considerable number of Africans were fleeing to a country with a minuscule economy like Namibia it is likely that SA might have to deal with large numbers, particularly once the refugees feel, as did my clients in deciding to flee to Namibia, that given that there was now a black govt. and respect for human rights, they would be well treated.

Derogation

I think the remarks of Hatchard and Slinn, Namibia: The Constitutional Path to Freedom, (1991) 17 CLB 664 at 660 regarding Art 26 of the Namibian Const. are worth noting. They state that it would have been preferable if the Art has also clearly specified the rights of emergency detainees regarding access to legal representation and families; receipt of clothing and writing material etc.

Customary Law

I did a fair amount of research into the constitutionality of various aspects of customary law in Namibia for submissions which the LAC made to a govt. commission on the role of Chiefs, Headmen and other traditional leaders (as far as I'm aware the commission has never reported). In Namibia there had been legislation since the 1920's which had had an impact on almost every aspect of

customary law. This process had had the effect that in order to determine when and how customary law was to be applicable statute had to be referred to. It was also difficult to conceive of how those aspect of customary law which had not been created or altered by statute were severable from the 'genuine' law. The legislation from which customary law derived its status as law and from which the traditional leaders derived their powers was almost certainly unconstitutional on amongst others the grounds that it was both extremely racist and was so uncertain as to be incomprehensible as parts of the legislative whole had been repealed when some of the more obviously noxious statutes had been repealed in the schedule to the Constit. and others that remained referred to govt. bodies and officials that had ceased to exist and for whom there were no successors in title.
In the traditional areas the leaders were however continuing to do what they had always done and the LAC was getting instructions in some cases corcerning the use of unfair procedures and cruel punishment in some of the traditional courts. But it was also apparent that if taken to court many aspects of 'pure' customary law regarding: almost all aspects which dealt with women's rights; the manner in which land was allocated; the law of succession (which tribe you were a member of could have a fundamental bearing on the size of your inheritance where you fell outside of 'white law' ie where the deceased died intestate) etc could be struck down.

Thus the situation was a complete mess and although I am no expert in customary law I am aware that the path of legal development in SA has been substantially similar in that the general approach has been that as long as 'they apply their law only amongst themselves we will not concern ourselves too deeply with what goes on as we want to keep the (co-opted) traditional leaders happy.' What one ends up with then is two separate legal systems which often have little in common. About the one little is known except that in large parts of the country it is the law used by those authorities who to all intents and purposes carry out the majority of governmental functions and is it thus the law which has the major influence on the rights and obligations of the inhabitants of these areas. Along comes a bill of rights with which that system of laws must accord in circumstances where according to some authors customary law does not even recognize the technical legal concept of individual rights.(see Donnelly in Welch ed., Human Rights and Development in Africa,p289 and the authorities cited)

The problem is that if we are to have an integrated legal system in the sense that rights are to be equally enjoyed by all citizens irrespective of where they happen to live then questions about the role of customary law have to be dealt with. It is a highly politically controversial issue in that if a bill of rights is to have full effect in the traditional areas then inevitably traditional leaders will be deprived of some of their former powers effecting not only their power base but also their income earning potential. (In Ovamboland, for example, a large portion of their income was/is derived from 'payments' made to them by recipients for allocations of trust land and by the

receipt of a cut of the damages awards made in court cases.)

I don't think the problem becomes politically easier to deal with after the onset of majority rule and I don't think it should be left to simmer on the back-burner as appears to have happened in many countries as the consequence could easily be that the bill of rights would be of little benefit to people in many rural areas. In this regard it would be of benefit to study developments in Bostwana and Zimbabwe where the traditional court systems have been integrated into the court system as a whole. I think the Botwana system has a feature which is particularly good and that the use of the traditional courts to resolve disputes is always voluntary and the accused or litigant always has the option to prefer use of the ordinary courts. I think that this amy be the only whay in which the use of parallel systems of law can be operate without violating the right to equality of the law. If Roman-Dutch law confers greater rights on a rights subject in the resolution of a particular dispute than say Zulu customary law then it would seem to me that unless use of Zulu law is optional its application will be unconstitutional.

I think it also goes without saying that post-bill of rights litigation should not be relied for solutions as the problem requires a holistic solution and in either event the time delays involved mean that some people would have to wait many years for their rights to be respected in circumstances where the rights deprivation was glaringly obvious and thus deserving of protective legislative intervention. An example of this is the issue of a wife's and children's rights to inherit from their father. It seems that under customary law in many countries most or all of a husband's property reverts to his family and his wife and children may enjoy little or no rights to his property upon death, the theory being that she will return to her family who will support her. I know that in Namibia the LAC was considering a challenge to this law as we had a case where the deceased's brothers had kicked the wife and children out of the home and had taken her car. I am told by a Nigerian lawyer that a similar law still prevails in Nigeria whereby the wife can never inherit land. He works for the LRC's equivalent in Nigeria and says that although they have wanted to challenge this practice all their potential plaintiffs have been too scared, fearing social ostracism.

<u>Data Protection Rights</u>

I have enclosed a short article explaining why this has become an increasingly important right. The crux is however contained in this paragraph:

> For all its complex and, indeed, technical nature, data protection is an increasingly essential safeguard in the information era: these days, many if not most decision affecting people are taken, not by people who personally know the individual concerned, or even on the basis of any personal contact or interview with that individual - but rather on the basis of the

> facts (or alleged or reported facts) on that individual, contained in a file or data base. Serious harm can be done to vital interests of individuals if they cannot check whether the data used in such decisions is accurate, relevant and up-to-date; the matter is of course even worse if they do not know what data is used at all (as when employers rely on secretly provided data by public or private vetting agencies). This does not affect just their "privacy": the use of incorrect or irrelevant data can affect a person's chances of obtaining employment, housing, credit etc. etc. In the information era, it is therefore manifestly crucial that data subjects are provided with adequate means and remedies to ensure the accuracy and relevance of data held on them in such files and databases, as well as the lawfulness and fairness of the methods used to obtain the data, and of the uses and exchanges of the data by and between various bodies.

The facts of the two leading judgements of the European Court on Human Rights on data protection clearly illustrate the nature of the problem. In Leander L was dismissed from employment in the public sector as he had been classified as a security risk by unknown persons in the Swedish secret police and for unknown reasons. L sought the opportunity to rectify the file's contents. Gaskin's case concerned G's right to obtain access to a local authority file which contained details of how he had been maltreated as a child while in a foster home. At Interights I have worked on some other cases dealing with similar problems and it is apparent that this area has become is an important individual rights issue in the developed world.

The rights of access to data and control over collection of data issues have been created out of the privacy and right to family life (which limits the right of the state to interfere in private family life) articles of the European Convention on HRts but in my view its apparent that these arguments have required interpretation of 'older' rights which have had to be adapted to cater for a problem the extent of which could not have been accurately forecast in the pre-computer era. I think we could usefully draw from the experience they have had with the problem by ensuring that our Bill of Rights explicitly includes as part of the right to privacy a paragraph to the effect that the state shall not, beyond the extent strictly necessary in a democratic society, engage itself in the collection, retention or dissemination of personal data concerning individuals and individuals shall enjoy reasonable access to all personal data in the possession of the state. Complementary subsequent legislation would obviously also be needed but as all govts. have a vested interest in attempting to preserve secrecy it would seem unwise to rely on ordinary legislation to in of itself solve the problem. What I am proposing goes beyond Art 30 of the ANC's draft as Art 30 appears to relate only to one aspect of the problem, information gathering for state security purposes, and contains no reference to a public right of access

to personal files.

Standing

I drafted in memo for LRC and LAC while at the ACLU on using US civil rights law in Southern Africa. (I sent a copy to Geoff) In that memo I made mention of two rights conferring standing which should be considered for incorporation in the Const. The obvious one is the the right to bring class actions. The other, which I think is a very good system, is the right to bring taxpayers suits - a rule of standing premised on the theory that any taxpayer has standing to seek a declaration that govt. conduct is unconstitutional as the govt. is not entitled to waste taxpayers money by engaging itself in unconstitutional activities. In the memo I annexed some literature on the subject.

Appointments to the Public Service - Checks and Balances

This is not an issue that should be dealt with in a bill of rights but in my view its an important constitutional issue that has not received adequate attention in the light of the huge problem that exists in all developing countries (and existed in the recent past in all developed countries) arising out of the fact that, in essence, appointments to the public service are made on the understanding that the public service forms part of the spoils of victory. Having seen the debilitating effect of this practice on the potential efficacy of the state in Namibia I started to think how it would be possible to use a constitution to inhibit the ability of govts. to do what they feel politically compelled to do; that is to reward not only those amongst their supporters who merit public appointments, but also those who do not. I've used some of my time in the USA and here to do some comparative research on the subject based on the assumption that the conventional combative measures such the establishment of public service commissions and the 'usual' public service legislation (which states that appointments may only be on merit) do not suffice. I however still need to do a lot more work before I would be in a position to write up anything decent. When I do I'll let you have a copy. If you are aware of anyone who is researching this issue please let me know. (The Law Commission takes the view that all our existing laws on the subject are fine, but maybe they never noticed how the public service in SA was transformed to become what it is today, a living tribute to ethnic nepotism.)

I hope the above is of some use. If expert advice on any of the above topics is required I could suggest lawyers who I have met or am aware of who could be approached for assistance. By the time you receive this I will have left Interights to do some travelling. If you need to contact me my address from 15 May to 8 June is c/o S.Friess, Willibald-Alexisstrasse 27, 1000 Berlin 61, Germany; otherwise my brother should know where to find me.

Regards

Yours sincerely

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LEGAL AND CONSTITUTIONAL AFFAIRS DEPT

MEMO

TO : ALL CONSTITUTIONAL COMMITTEE MEMBERS

FROM : ZOLA SKWEYIYA - LEGAL AND CONSTITUTIONAL AFFAIRS DEPT

DATE : 11 AUGUST 1992

SUBJECT: REPORT - USA VISIT

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Dear Comrades

Kindly find enclosed report on the visit by the Constitutional Committee of the ANC to the United States of America and the ANC policy guidelines for a democratic South Africa. All comments on the report be directed to comrade Bulelani Ngcuka.

Best Wishes

Pp
ZOLA SKWEYIYA
DIRECTOR LEGAL AND CONSTITUTIONAL AFFAIRS DEPT