

MCH 91-93-3-5

10:55

Dear Tuton -

In the end, I reviewed
the DP Bill of Rights.

I can do the overview
on another occasion if
you like.

Allie .

wmrights

COMMENTS ON THE DP BILL OF RIGHTS

Albie Sachs

On first reading, I rather liked the Democratic Party's draft Bill of Rights. It is lean and clean without being mean. It is certainly the neatest and most compact of the many drafts prepared by different bodies.

If one day children are commanded to learn the text of a Bill of Rights off by heart, they will certainly opt for this one. Since a certain innocence should lie at the heart of every Bill of Rights, the elegance and simplicity of phrase are to be commended.

There are three major strategic and difficult questions that any Bill of Rights has to face. On all of them the DP document at least pointed in what I consider the right direction.

The first is over the scope of the Bill of Rights. Does it act only as a limitation on government action, or does it have wider application? It is sometimes said that a Bill of Rights only applies vertically between citizen and state, and not horizontally between citizen and citizen.

In South African conditions, the real question is whether privatised apartheid is to be permitted by the constitution [or, even worse, protected by it].

The DP draft declares that the rights contained in it shall be respected and upheld not only by all organs of state but also 'where applicable, by all persons.'

This is particularly important in relation to the section on equality, which says there shall be equal treatment and no discrimination. Discrimination is defined as unjustified differentiation. Differentiation on a number of specified grounds is presumed to be unjustified unless it is 'the result of a decision made in the exercise of the type of private choice which preserves personal autonomy.'

By implication, differentiation which was not truly based on private autonomy, but simply intended to keep blacks, or gays, or women, or disabled people or jews out of a job or a house or a motel, would be unjustified.

The second praiseworthy option of broad significance made by the drafters is in favour of the legitimacy of affirmative action. The dreaded or desired term is not itself used. Instead, it is provided that differentiation on specified grounds shall be presumed unjustified 'unless it is part of a rational programme intended to remedy substantial inequality.'

Put another way, differentiation designed to overcome disadvantage suffered by blacks or women [or older people or non-believers etc] would not be held to violate the equality clause provided it was part of a rational programme to advance the rights of those held back.

The third relates to social and welfare rights, though once again these dreaded or desired words are not used. In an article called Entitlement to the Essentials of Life, every citizen is said to be entitled to the food and water necessary for survival, to shelter from the elements, to basic health care, to a basic education, and to a clean and healthy environment.

No matter that it promises little more than at least the workhouse for all, a year ago this would have been considered socialism.

The article goes on to emphasise that basically it is up to Parliament rather than the courts to decide on these entitlements. Any decision by Parliament which is reasonable and practicable and which respects the limitations on available resources, shall be regarded as justified.

So, having given the DP reasonably good marks for overall style and for substance in these key areas, why do further readings of the document leave me disquieted?

Strangely enough, while the DP seems to have made some tentative but creative advances in the areas where it is generally considered weakest, namely, in relation to overcoming de facto inequality, it disappoints in relation to its chosen ground of libertarianism.

I will repeat an expression I have used before: This is Illyria, lady - This is South Africa, man.

In South Africa you have to spell certain things out. If you are against censorship, you must say so explicitly, or use language that leaves no doubt, not simply speak about freedom of expression.

If you wish to uphold the rights to conscientious objection, you must use language that points clearly in that direction.

I do not see anything that outlaws or at least severely inhibits phone-tapping, intercepting mail, spying on people, bugging rooms [sorry, WM, though I think you were right to do wrong], tailing people and keeping secret files. These are the modern, Kafka-esque ways of controlling and manipulating people. Something stronger than the vague though important right to dignity and to privacy is required.

Then there is the question of capital punishment. Perhaps it is because I am the son of Solomon that I object to the drafters' claiming to follow what they call the Solomonian policy adopted by the Law Commission, namely, to leave it to future judges to decide whether capital punishment violates the right to life or not.

When the original Solomon orderered the child to be cut in half, he in fact intended to force a decision, not to postpone one. His objective was to discover who truly had heart and courage, and who was simply the opportunist. Capital punishment should be outlawed. Full stop.

Perhaps the most striking weakness of all is in relation to the rights of arrested persons. The draft says that every person who is arrested or detained shall have the right to be released or to be charged and tried within a reasonable time.

The phrase 'within a reasonable time' seems unreasonably vague. When I first practised at the Bar, it was axiomatic that 48 hours was the maximum period that someone could be held before being brought to court. Successive security laws have so undermined our libertarian consciences that unless we use words of an imperative character, detainees will be kept for far longer in the new new South Africa than they were in the old old South Africa.

Then, on a third reading of the draft, I discover that much of its elegance comes from it having avoided many of the hard, nuggety and uncomfortable questions that should have been tackled.

Gender oppression is not new, but the revolt against it and the determination to establish well-protected human rights for women, is. The draft shows an awareness that there is discrimination against women but does not tackle sexism and patriarchal domination. The dignity and privacy clauses

could be built upon - at the moment they appear quite pallid in the face of extensive violence against and subordination of women, in the home, in the streets and at work.

Similarly, the question of workers' rights is ducked altogether. No future Parliament should be able to take away the three basic rights that workers have won: the right to independent unions, to collective bargaining and to strike.

There is nothing on children's rights and a very weak section on language and cultural rights, a difficult area that requires great sensitivity and thought.

The section on property rights might be acceptable if present ownership was considered legitimate. In fact, the way people were dispossessed by conquest and racial statutes undermines the legitimacy of present titles and demands a much more nuanced property clause than the present pro-status quo one.

Finally, the drafters cosily and disappointingly rely on the existing judiciary to enforce the Bill of Rights. The introduction to the document states that a special Constitutional Court, presumably even one at the apex of the judiciary as in the USA, would become 'too contentious, powerful, politicised.' One wonders what the present court has been these last decades.....