

MCH91-19-3-2

ONE NEW YORK PLAZA  
SUITE 2500  
NEW YORK, N.Y. 10004-1980

(212) 820-8250

November 22, 1991

Mr. Arthur Chaskalson  
National Director  
Legal Resources Center  
P.O. Box 9495  
Johannesburg 2001  
South Africa

✓  
Mr. Albie Sachs  
The University of the Western Cape  
Common Law Center  
Private Bag X17  
Belleville 7535  
South Africa

Dear Arthur and Albie:

It was lovely to see both of you, our pleasure enhanced by the excitement and imminence of change in South Africa. It is all very formidable and very wonderful.

Herewith my thoughts about your splendid draft of a Bill of Rights. They should be considered illustrative, rather than exhaustive -- very much random off-the-cuff reactions by a non-expert to a cursory airplane reading of the document. It would be presumptuous of me if I were not sure you would make short shrift of anything already considered or not worthy of consideration.

Most of my comments go to workability, rather than philosophy.

To: Arthur and Albie

-2-

November 22, 1991

### 1. Questions of Substance

My most serious concerns are with Article 15, Section 1 which denies constitutional protection to "any activity or \* \*, any act aimed at the destruction" of rights, freedoms, etc. and Article 13, Section 1 which immunizes from constitutional challenge any action taken with an appropriate purpose.

These limit unduly the protections afforded by the constitution. Together they make it too easy for the state to oppose, punish and criminalize opposition to its programs. Could one constitutionally challenge a statute penalizing attempts via speech or work stoppages to reduce ownership of private property through constitutional change or to limit through legislation the way in which compensation was to be measured? Could not the state criminalize opposition to statutes designed to remediate race and gender discrimination even if the opposition was on the grounds that the statutes were too far reaching or required action to be taken too quickly? It seems to me that it would be too easy to trample opposition viewed as "disloyal," to the purposes of the constitution.

I also think I would be more protective of speech. In the U.S. the courts have worked out reasonably satisfactory implicit limitations even where the Constitution's guaranty is absolute. I therefore wonder whether the limitations permitted by Article 5, Section 10, are necessary or wise.

Hate speech is a problem, but it seems to me should it should be interdicted only where there is a relatively clear and present danger of violence.

### 2. Problems Arising From the Immediate Justiciability of Rights Under the Constitution

Some portions of the Bill of Rights refer to implementing legislation. Others do not; the Bill creates immediately enforceable rights which the state may not be able to fulfill on immediate demand. There is always a problem when one tries to get a court to discharge normally legislative functions; it would be especially acute where resources simply are inadequate.

Some examples are as follows:

2.1. Does the word "privileges" in Article 1, Section 2, encompass expenditures for education and health? If so, and if there were de facto discrimination, could a lawsuit be brought to demand equalization?

2.2. Do legal resources permit the provision of a hearing in 48 hours (Article 2, Section 10) or legal counsel (Article 2, Section 20)? If not, will you simply be unable to get valid convictions?

2.3. Will Article 2, Section 31, unduly limit your ability to deal with urbanization even in a non-racial manner?

3. Amiguities and Inconsistencies.

3.1. Article 2, Section 4 uses the words "normally" and "normal." When and where?

3.2. Article 2, Section 20 talks about "the interests of justice." Would you be better off with a more definite standard?

3.3. Article 3, Section 2, makes all members of government accountable. Judges? If so, how?

3.4. Article 4 seems to give unlimited rights, while Article 5, Section 10 provides for some limitations. Artistic activity and speech may well overlap.

3.6. It appears that Article 5, Section 2, may be overridden by Article 5, Section 3. It seems to me it should be the other way around. Cooperation under Section 3 should be subject to the non-establishment requirements of Section 2.

3.7. In Article 5, Section 10 and in other provisions, there is reference to open and democratic societies. I am not sure which societies you would pick or what the results would be. They vary.

To: Arthur and Albie

-4-

November 22, 1991

3.8. Article 7, Section 3, Article 11, Section 5 and Article 13, in somewhat different ways refer to past discrimination. I think you should be careful to avoid anything which would limit the benefits of the constitution to persons who have been the direct object of identifiable discrimination (this has been a problem in the U.S.); refer to members of groups which have historically been victims of discrimination.


3.9. It seems to me that the state should have the right expressed under Article 11, Section 4, to regulate all property and not just natural resources, etc.

3.10. Article 13, Section 1, which overrides everything else refers to "access" to various things including land. Is this intended to override the just compensation requirements and other limitations of Article 11?

Most of the above is probably pettifogging. Do with it as you will. You need not reply.

You're on a great adventure. All our best.

Sincerely,

  
Robert H. Preiskel, P.C.

4817n