

MCHou-92-6-6

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Ronald  
Dworkin's  
detailed notes  
on ANK Bill  
of Rights 1991.

May 12, 1991

Abbie Sachs  
South Africa Const  
London  
By fax: 071-255-21

Dear Abbie,

I am sorry not to have sent this on sooner; I have been under great pressure from other work. Nor is this as full and detailed as I would have liked. But it will remind you, I hope, of our discussion, and add some specific comments I did not make then. Obviously I should be happy to amplify anything, or reply to any questions you or anyone else might have about my meaning or views. You mentioned the possibility of my coming to South Africa in due course to discuss the Constitution with your committee. I would of course be happy to do that at some time convenient for you and possible for me.

1. May I remind you, at the outset, of my two overall points? The first is that a stricter distinction should be made between rights that are in principle adjudicable and those that are not, but which should figure in a Constitution as hortatory. You might consider a tri-partite attack. The Constitution itself would be divided, as is growing more customary, into two parts. The first would enact adjudicable rights and the second would recite social and economic rights any government would be deemed to have a solemn obligation to undertake to satisfy. Then there might be, as a third component, a draft statutory charter, setting out the minimum initially acceptable first steps to secure the latter set of obligations, steps the first parliament under the new constitution would have a mandate, through the political process of constitutional adoption, to enact.

2. The second general point concerns exceptions and derogation. I am unhappy about the use in several places of the idea that exceptions are permitted if they "would be acceptable in an open and democratic society." (See, eg. Article 2, clauses 29, 30; Article 5, clause 10; Article 6, clause 7; and, most dangerous because most general, in Article 15, clause 2). It seems to me that an executive bent on evading the Constitution could justify quite extreme measures by finding some other country nominally or even obviously a democracy that nevertheless also violates the right in question in the contemplated circumstances. After all, even the most obvious democracies have some practices that your constitution condemns



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May 12, 1991

Abbie Sachs  
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 London  
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Dear Abbie,

I am sorry not to have sent this on sooner; I have been under great pressure from other work. Nor is this as full and detailed as I would have liked. But it will remind you, I hope, of our discussion, and add some specific comments I did not make then. Obviously I should be happy to amplify anything, or reply to any questions you or anyone else might have about my meaning or views. You mentioned the possibility of my coming to South Africa in due course to discuss the Constitution with your committee. I would of course be happy to do that at some time convenient for you and possible for me.

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as a violation of fundamental rights. The United States, for example, continues to use the death penalty. So it seems dangerous to allow the survival of important rights to depend on what other democracies decide is permissible. I would prefer to follow the older practice, which I think has worked well. This is to state general rights in abstract terms, with no specified exceptions, but to allow the courts to adjudicate cases in which rights stated so abstractly conflict with other abstract rights, for example to privacy or security, or when they must yield in the face of genuine emergency. But if you decide not to follow that example, I would suggest that you rephrase the exceptions we are discussing so that they each refer to exceptions "that are generally accepted throughout open and democratic societies". (Note the difference between that and the language of Article 5, clause 10, which uses "generally accepted *in* open and democratic societies").

3. I now list various more specific points. I will be brief, but of course would be happy to amplify my comments and suggestions if you wish. I begin with Article 2. I would suggest that clause 1 read: "Everyone" rather than "every person" has the right to life. That comports with clause 2, which begins "No-one", and seems to me more neutral on the question of abortion, not logically, but just because the word "person" has figured so prominently in "pro-life" rhetoric that the present wording might seem an endorsement of that position.

4. Clauses 8 and 10 might be clarified so as to make plain the differences between them. Does 8 forbid anything not already forbidden by 10, which is more specific? The difference between 10 and 17, with respect to notice of charges, might also be clarified.

5. Clause 16 should make plain that it condemns double jeopardy -- a second trial of someone who has already been acquitted once -- as well as double punishment.

6. Clause 20 might specify that counsel will be provided either if the crime in question carries a jail sentence or if "due process" or the interests of justice so require. It is good to be very cautious here, because governments look for reasons not to pay for counsel.

7. Does clause 27 rule out the familiar restrictions on marriage, about age, blood relationships, etc?

8. Could 28 be read to impose a community-property regime in divorce cases, so that all property is split? Is that intended?

9. Article 3, clause 4, raises difficult questions. Shouldn't something so fundamental as the occasions of elections be specified more precisely than just that they must be regular? What about a maximum period between elections? Incidentally, what about age restrictions on voter qualification?

10. Article 4, clause 1. The mandate of a right to reply might well raise problems unless it is more specific. Does this mean that the press must print claims that it does not believe true? That it must give free space to everyone it criticizes, on demand? That would be very expensive, and open a way to put some paper out of business. There is much literature on this problem. I once suggested, not a constitutional right of reply, but that the press should gain a defense from libel if it does print a reply.



11. Clause 3 seems to provide an open-ended freedom of information right. What about the costs? What about risks to security? Or to the privacy of others? Actual right-to-information statutes are generally very complex.
12. Article 5, clause 9. This is a good example of a right that makes sense only in the second category described in comment one above. But even so it seems too open-ended. Does it suggest a responsibility to subsidize literature in each of the languages, for example?
13. Clause 10 seems a good example of the dangers of the exception language even in the form used there. Quite serious constraints on freedom of expression, to protect conventional standards of decency, are common among democracies.
14. Article 6, as a whole, suggests the importance of the distinction I discuss in the first comment. It seems important not to let the evident hortatory character of clauses 10-12, for example, detract from the mandatory and adjudicable character of most of the other clauses of this article. I think that unless they are structurally separated, and appear in different departments of the constitution, there is a serious risk of corrupting the imperative character of the important rights provided.
15. Does Article 6, clause 4 amount to a constitution requirement of a closed shop?
16. The general comment about Article 6 holds for Article 7 as well. Clause 3 appears mandatory, but cannot be specified. It is important that that not weaken clauses 1 and 2. The same for the two clauses of Article 8, and for others of the remaining articles, but I will not repeat the point again.
17. Article 9, clause 3 is very strong. Is it constitutionally prohibited to take the interests of the parents into account even when the child's interests only marginally incline in favor of one decision about custody, for example, but the interests at stake for one of the parents are very grave?
18. I have not commented individually on the economic and social rights articles, but obviously intend comment 1 to apply to them.
19. I expressed a serious reservation about Article 15, clause 2 earlier. It strikes me that clause 3 is not only unnecessary -- it should go without saying -- but unhelpful, and perhaps best left out, particularly if the exceptions are made more rigorous.
20. Article 16, clause 2. I would think that the character of the constitutional court, and the method of appointment to it, is so central to the character of the constitution that it should be made part of it. But I recognize the political problems involved.

Walter J. Rauschenberg  
Rauschenberg



### Workers

A charter protecting workers' trade union rights, especially the right to strike and collective bargaining shall be incorporated into the constitution.

### Women

Women shall have equal rights in all spheres of public and private life and the state shall take affirmative action to eliminate inequalities and discrimination between the sexes.

### The Family

The family, parenthood and children's rights shall be protected

### International

South Africa shall be a non-aligned state committed to the principles of the Charter of the Organisation of African Unity and the Charter of the United Nations and to the achievements of national liberation, world peace and disarmament.

*A Charter of Women's Rts. emphasis.*  
*equal rights within the family*  
*Children's Rts.*

## CONSTITUTIONAL GUIDELINES FOR A DEMOCRATIC SOUTH AFRICA

The Freedom Charter, adopted in 1955 by the Congress of the People at Kliptown near Johannesburg, was the first systematic statement in the history of our country of the political and constitutional vision of a free, democratic and non-racial South Africa.

The Freedom Charter remains today unique as the only South African document of its kind that adheres firmly to democratic principles as accepted throughout the world. Amongst South Africans it has become by far the most widely accepted programme for a post-apartheid country. The stage is now approaching where the Freedom Charter must be converted from a vision for the future into a constitutional reality.

We in the African National Congress submit to the people of South Africa, and to all those throughout the world who wish to see an end to apartheid, our basic guidelines for the foundations of government in a post-apartheid South Africa. Extensive and democratic debate on these guidelines will mobilise the widest sections of our population to achieve agreement on how to put an end to the tyranny and oppression under which our people live, thus enabling them to lead normal and decent lives as free citizens in a free country.

The immediate aim is to create a just and democratic society that will sweep away the centuries-old legacy of colonial conquest and white domination, and abolish all laws imposing racial oppression and discrimination. The removal of discriminatory laws and eradication of all vestiges of the illegitimate regime are, however, not enough; the structures and the institutions of apartheid must be dismantled and be replaced by democratic ones. Steps must be taken to ensure that apartheid ideas and practices are not permitted to appear in old forms or new.

In addition, the effects of centuries of racial domination and inequality must be overcome by constitutional provisions for corrective action which guarantees a rapid and irreversible redistribution of wealth and opening up of facilities to all. The Constitution must also be such as to promote the habits of non-racial and non-sexist thinking, the practice of anti-racist behaviour and the acquisition of genuinely shared patriotic consciousness.

The Constitution must give firm protection to the fundamental human rights of all citizens. There shall be equal rights for all individuals, irrespective of race, colour, sex or creed. In addition, it requires the entrenching of equal cultural, linguistic and religious rights for all.

Under the conditions of contemporary South Africa 87% of the land and 95% of the instruments of production of the country are in the hands of the ruling class, which is solely drawn from the white community. It follows, therefore, that constitutional protection for group rights would perpetuate the status quo and would mean that the mass of the people would continue to be constitutionally

*A* → *Special clause to women*