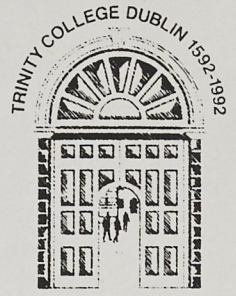


MCH 41-16-3-1

TRINITY
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30 May 1991

To Members of the Constitutional Committee

You may be interested in a couple of items concerning our draft Bill of Rights.

Firstly, I enclose a copy of a letter written by the former Taoiseach (ie., Prime Minister) of Ireland to Louise Asmal. Louise solicited this response after I had told her that Garret FitzGerald had spoken favourably about our draft at a conference attended by Zola, Bulelani and I, among others, in Boston in March 1991. FitzGerald's response is important as he is not only a qualified lawyer, but very influential in EC circles where he is considered to be a top intellectual.

The second concerns Judge Olivier. Yesterday, I received in Dublin an aggrieved 'phone call from The Netherlands to say that Olivier was participating in a 'secret and confidential' meeting at the Hague organised by the Ministry of the Interior for Dutch lawyers, civil servants and academics. He was selling his version of the Bill of Rights and is reported to have said that there was a 'large measure of agreement' between the ANC and the Government on this issue.

It seems to me that Olivier is embarked - and has been now for some time - on a strategic venture to sell his approach. He has therefore travelled to nearly every major - and some minor - European countries, holding seminars with Law Commissions and government departments. There must be some kind of moral in all this for us...

Thirdly, I enclose a copy of a recent article by Dr Asbjørn Eide, or Norway, on implementation of economic and social rights. From our recent seminar on the Natal North Coast, this area emerged as one of the liveliest areas of contention. Although Eide refers largely to international standards, what he has to say is relevant, pari passu, to our domestic needs and work.

Kader Asmal

PS The revised provisions on
four sections of the proposed
are enclosed.



DAIL ÉIREANN
BAILE ÁTHA CLIATH, 2.
(Dublin, 2).

Mrs. Louise Asmal,
Hon. Secretary,
Irish Anti-Apartheid
Movement,
PO Box 1974,
Foxrock,
Dublin 18.
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17 April 1991

Dear Louise,

I enclose a note I have written on the ANC's Bill of Rights which reflects my reaction on reading it in Boston - although in speaking there I did not have the opportunity of going into so much detail.

Yours sincerely,

Garret FitzGerald, T.D.

Note on Working Document by the ANC Constitutional Committee on
a Bill of Rights for a new South Africa

I am impressed by the provisions of this Bill of Rights, some of which appear novel. The abolition of capital punishment; the right to judicial review; the right to information necessary to enable citizens to make effective use of their rights; the provision of the law to provide remedies for sexual harassment, abuse and violence; the provision against discrimination against disabled persons; the provision that in proceedings dealing with children the priority consideration should be the best interests of the child; the provision to ensure the introduction of minimum standards of nutrition; the provision that education should be directed towards the full development of the human personality and the sense of personal dignity: all these are examples of rights for which I am not aware that provision has been made in other Constitutions or Bills of Rights. They are to be widely welcomed.

The concept that certain rights shall be protected save where provision is made by law for reforms that would be accessible in a fully democratic society is a constructive approach to maximising freedom while recognising the need in certain instances for interventions in the public interest that could affect human rights. The specific reference precluding anything in the Constitution interfering with religious institutions,

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bearing witness and commenting on the actions of the State, while safeguarding the separation of Church and State, is valuable. Moreover the realism of a number of provisions which provide for progressive implementation of measures such as the realisation of basic social, educational, economic, and welfare rights and for a progressively expanding floor of enforceable minimum rights with special attention to nutrition, shelter, health care, education and income is realistic, as are rather similar provisions in respect of house-building, energy, access to clean water and appropriate sewage and waste disposal and a progressive expansion of access to secondary education and pre-school institutions.

The provisions in respect of property seem well balanced, given the need on the one hand to tackle the extreme inequalities of distribution of property that exist in South Africa and on the other hand the desirability of offering reasonable reassurance to existing property owners.

One or two matters strike me as being capable of giving rise to difficulty such as the blanket provision against detention without trial, (the reason for which, however, I fully understand in the light of South African experience), and the lack of provision for a right not to associate with others, which I believe can be important to prevent pressure by trade unions on individuals. But overall the document is one which will be welcomed by anyone interested in the expansion of human rights worldwide.

I should add that my comments are those of a politician without expert knowledge of human rights provisions in countries other than Ireland.

Re-drafted Provisions - May 1991

Chapter ?

Article ? **International Relations**

- (1) The State affirms its devotion to the ideal of peace and friendly co-operation among states founded on international justice and morality. In particular, it shall respect the rules of international law in its relations with other states.

- (2) In its international relations, the State shall be governed by the principles of national independence, respect for human rights, the right of peoples to self-determination and independence, equality among states, the peaceful settlement of disputes and the promotion of international peace and co-operation.

- (3) The State shall strictly observe the principles of non-interference in the internal affairs and good neighbourliness in relation with South Africa's neighbouring and other states. Except for the purposes of self-defence as determined by the Charter of the United Nations, or in pursuit of any special request by the United Nations or a regional organisation, no military contingent under the direction or control of the State may be deployed outside the State without the express authorisation of the National Assembly.

- (4) Through its membership of regional and international

organisations, the State shall support the establishment and maintenance of a system of collective security and the creation of an international economic and social order capable of safeguarding peace, justice and progress among peoples.

- (5) The executive power of the State in or in connection with its external relations shall, in accordance of ^{way} Article ?? of the Constitution, be exercised by or on the authority of the President, and the Cabinet.
- (6) ~~For the purpose of the exercise of any executive function of the State in or in connection with its external relations, the President and the Cabinet may to such extent and subject to such conditions, if any, as may be determined by law, avail of or adopt any organ, instrument or method of procedure used or adopted for the like purpose by the members of any international or regional group of states with which the State is or becomes associated for the purpose of international co-operation in matters of common concern.~~

Article ? International Law

(1) Unless otherwise provided by the Constitution or any Act of Parliament, rules of customary international law shall be binding on the State and shall form an integral part of South African law. Such rules shall directly create rights and ~~dates~~ for inhabitants [~~? persons within the~~] of the State. They shall take precedence over existing ordinary laws of the State.

(2) Subject to the provisions of the Constitution, international agreements binding on the State shall form an integral part of the law of South Africa.

(3) In interpreting the provisions of the Constitution or any law, a court of law may resort to the following as interpretative aids (i) rules of customary international law (ii) the provisions of international agreements binding on the State (iii) the general principles of international law enshrined in the Charter of the United Nations or in any other international or regional human rights convention which has been or may be concluded, whether or not the said instruments or any of them are binding on the State.

Refugees

Article ? Right to Asylum

- (1) The right to asylum shall be secured to aliens and stateless ^{persons} fleeing persecution as a result of their activities on behalf of democracy or national liberation or because of their political beliefs, race, religion or membership of a particular social group.
- (2) The status of political refugees shall be defined by law, in accordance with recognised international standards.
- (3) No one may be extradited for political reasons.
- (4) No one may be extradited for crimes which carry the death penalty under the law of the applicant state.
- (5) Expulsion, deportation and extradition shall be decided only by judicial authority.

Chapter ?

Article ? Local Government

(1) The ~~democratic~~ ^{democratic} organisation of the State shall include ^{non-raised} local authorities.

(2) The structure, functions and organisation of local authorities shall be regulated by law in accordance with the principles of administrative decentralisation, the need for democratic control and promoting local initiative. For this purpose, South Africa shall be divided ~~by law~~ ^{such} into local areas of authorities, ^{as may be} comprising metropolitan, urban district and rural district councils. ^{provided by law.}

(3) The determination of the boundaries of local authorities shall be geographical only, taking into account developmental needs and ^{where appropriate} the integration of urban and rural areas. No reference to the race, colour, ethnic origin or gender of the inhabitants of such area shall be taken into account in such a determination.

(4) The organisation of each local authority shall include an elected assembly or council, freely chosen by direct and universal suffrage, according to the system of proportional representation. Such an assembly or council shall have powers of decision-making. There shall be also be an executive organ responsible to the assembly for the implementation of its decisions.

- (5) Persons shall be qualified to vote in elections for local authorities either where they live or where they work. Every qualified person over the age of 18 shall be eligible to stand for and vote in an election to a local authority. The qualifications and registration of voters, the method of election to local authorities and all other matters dealing with or incidental to the administration or functioning of local authorities shall be determined by law.
- (6) Local authorities shall have the power to make regulations or by-laws which shall not discriminate on grounds of race, colour, ethnic origin or gender. Such powers shall be regulated by law and may provide for their supervision or control by the regional or the central government. *art. 1.*
- (7) Local authorities shall have their own assets and financial resources. The system of local finance shall be established by law. The State shall aim at a fair apportionment of public funds and by the provision of central grants correct the inequalities of resources as between local authorities.
- (8) The income from the management of their assets and the amounts collected from the use of their services, together with any central government grants, shall constitute the local government fund.

Services shall be provided on an equal basis to all residents.

(9) Local authorities shall be obliged to take corrective or remedial action to remove the imbalances or inequalities in the provision of their services and in the employment of their staff by reason of previous racial or gender discrimination.

(10) Provision shall be made by law for the general oversight and supervision of local authorities by the regional assemblies or by the central government. Such powers shall include the right to provide for substituted services within a local authority when it is either unable or unwilling to do so.

also methods

(11) *Min. responsible for local govt.* The ~~President~~ shall provide, by way of an annual report to the Senate, a general statement concerning the administration of local government throughout the State.

(12) Local authorities shall permit free access to the members of the public to all meetings of the council or assembly or to any of its committees, save where considerations of public safety or the protection of confidentiality or privacy, as determined by law, provide. Every voter in a local authority area and the press shall have the right to seek and obtain information from a local authority, under conditions to be determined by law.

(13) Local authorities shall be obliged by law to establish structures to consult and, where possible, involve in decision-making, civic bodies, trade unions and other

community organisations in their area.

Chapter?

Article ? Electoral Supervision Commission

- (1) There shall be an Electoral Supervision Commission which shall be independent and which shall act impartially.
The Commission's functions shall be determined by law.
- (2) Without prejudice to the generality of its powers, the Commission shall supervise the registration of voters and shall have the functions on all the matters which by law pertain to the organisation and conduct of elections to the National Assembly, the Senate, regional and local authorities.
- (3) The Commission shall be consulted in relation to any changes in the electoral law. The Commission may propose changes in the electoral law and practice to the President who shall table the Commission's comments or requests before both houses of parliament.
- (4) The Commission shall establish regional and local offices for the satisfactory conduct of its functions and all functions performed by the central organs of government or by local authorities shall be transferred to the Commission.
- (5) The decisions of the Commission in relation to any complaint or any investigation shall be binding on all persons.

- (6) The Commission shall ensure that the electronic media conducts its ~~their~~ operations and activities as fairly and impartially as possible during such periods as before and during an election referred to in paragraph (2). The Commission may give such directions as necessary to ensure the necessary impartiality and fairness. The Commission shall determine the extent to which the press shall be obliged to provide a right to reply at the request of an aggrieved party during such elections.
- (7) The Commission shall determine the extent to which parties and candidates shall be entitled to reasonable access to radio and television during such elections and shall determine by regulation the conditions for such access.
- (8) The Commission shall prepare a report at the conclusion of every election referred to in paragraph (2) above for the President ~~who shall~~ ^{Chairman of the} table the report before both houses of parliament. *Power of del*
- (9) The Commission shall comprise of a president, who shall be a judge or the Supreme Court, and not fewer than five or more than nine ordinary members. The president and the members of the Commission shall be nominated by the President and confirmed by the National Assembly and Senate by resolution. The President and the ordinary members shall serve for a period of 5 years, unless

removed before the expiry of that period by resolution of each house of parliament. Every member of the Commission shall be eligible for re-appointment.

Chapter ?

Article 1 Delimitation Commission

- (1) There shall be a Delimitation Commission which shall consist of a president who shall be a judge of the Supreme Court and five other persons to be appointed by the President with the approval of the National Assembly and the Senate. Every member of the Commission shall serve for a period of five years unless lawfully removed before the expiry of that period by resolution of each house of parliament. They shall be eligible for re-appointment.
- (2) The Delimitation Commission shall discharge its duties in accordance with the law and this Constitution and shall report to the President who shall table the Commission's report before the National Assembly. The President shall implement the recommendations of the Commission.
- (3) The duties of the Commission shall be to fix the boundaries or regions and local authorities. The determination of such boundaries shall be without any reference to the race, colour, ethnic origin or gender of the inhabitants of such areas.
- (4) The number of regions, together with the factors to be

taken into account for determining the area of regional councils, such as population, size, economic viability and other interests, shall be fixed by law. The criteria to be taken into account for fixing the area of local authorities shall also be determined by law.

- (5) The boundaries of regions and local authorities may be changed and new regions and local authorities may be created from time to time by the President but only in accordance with the recommendations of the Delimitation Commission.