

MCH 91-92-8-4

*File*

---

**SOUTH AFRICAN ANGLICAN THEOLOGICAL COMMISSION**

---

Chairperson: Bishop Sigquibo Dwane  
P.O.Box 629  
Grahamstown 6140: South Africa

Secretary: Rev. Dr. Jonathan A. Draper  
P.O.Box 375: Pietermaritzburg 3200: South Africa  
Telephone (0331)955192 Fax (0331)955599  
Telegrams University Telex 643719  
February 14, 1992

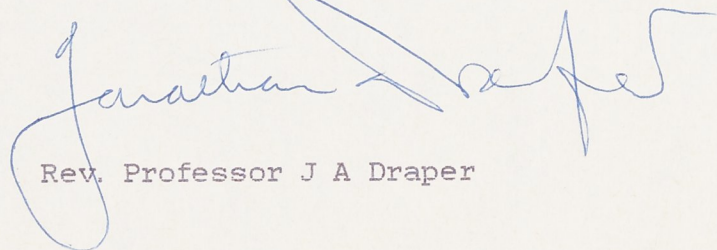
Prof. A. Sachs  
P O Box 3684  
Cape Town  
8000

Dear Professor Sachs

Many thanks for making the time to come to our Ecumenical Conference on the new Constitution at Mariannhill. Your input on the first morning was, I believe, very apposite and helpful. I know that many of the participants expressed appreciation. Thank you also for your quiet but important contribution in the two groups you attended. It was very helpful to have input from someone who is directly engaged in CODESA.

I enclose the reports of the four groups and the resolutions which emerged from the conference, for your information.

Yours sincerely



Jonathan A. Draper

Rev. Professor J A Draper

*JMB*

**SOUTH AFRICA FOUNDATION**

FAX - (011) 726 4705 /  
TEL - (011) 726 6105 /

*PO 7006  
Feb  
2000.*

IF THE MESSAGE OR COPY YOU RECEIVE IS INCOMPLETE PLEASE ADVISE IMMEDIATELY

FAX NUMBER: (021) 222-626

REF: 3 December 1991

*Hoare*

TO: Mr Albie Sachs

COMPANY: c/o ABBEY GROUP

FROM: Helen Hoare

NO OF PAGES: 1

Your paper "On constitutional mechanisms for redistribution in SA"

I would be most grateful if you could inform me where we could obtain a copy of your above paper. Neither the ANC information department nor constitutional unit have knowledge of it.

Your assistance is most appreciated.

Kind regards

*Send copy of  
Affirmative Action  
Sorry 4 delay.*

*Sent 3/3/92.*



5-21607 SA  
Fax (021) 22-2626  
(021) 22-2424

**COPY**

*X4 sets of attached  
[unclear] must. [unclear]*

1002 NBS Waldorf  
80 St. George's Mall  
☒ 3684  
Cape Town 8000

AS/mem

29 April 1991

Prof D J Devine  
Director  
Institute of Marine Law  
University of Cape Town  
Private Bag  
RONDEBOSCH  
7700

Dear Derry

Thank you very much for your paper. It is most pertinent and reads clearly. I will see to it that other members of our Constitutional Committee get it. May I suggest that you send a copy directly to Prof Kader Asmal c/o The Community Law Centre, University of Western Cape and you might also send a copy to Advocate Arthur Chaskalson of the Legal Resources Centre in Johannesburg.

We will all look at it closely. At first glance, the overall approach appears to coincide with our general line of thought. We will look with special attention at the transitional arrangements in relation to the TBVC and Walvis Bay. Your point re who owns the fish is an interesting one!

We look forward to your general comments on the draft Bill of Rights.

With best wishes

*Albie*

ALBIE SACHS



Institute of Marine Law

Our Ref: 147  
15 April 1991

Private Bag · Rondebosch 7700  
Cape · South Africa  
Telephone: 650-3074/3075  
Telex: 5-21439  
Telefax: (021) 650-3776  
Telegraphic address: ALUMNI Cape Town

Professor A Sachs  
Kismet  
41 Third Beach  
CLIFTON  
8001

Dear *Albie*

I am following up my letter of 25 March, your reply of 2nd April and my letter of 3 April 1991 on the question of international law-related topics for a new South African constitution. I have now filled out the draft provisions with full comments in the form of an article which I have submitted to SA Public Law with a view to possible publication. I have included a references to humanitarian law in the section dealing with the relationship between international law and national law. I have re-drafted the article called 'Foreign Relations' (page 7) to reflect support for humanitarian law, territorial integrity and political independence of states, the promotion of disarmament and nuclear free zones. There is a slight modification in draft article C (1) where (e) becomes (f) and a new (e) is inserted. This you will find on page 8 of the article which is entitled 'Suggestions for the incorporation of some international law-related provisions into a new South African Constitution'. I thought you might like to have a copy in advance of possible publication. I am also forwarding it to the ANC Constitutional Committee.

The article as submitted to SA Public Law contains an acknowledgement of the help which you have generously given to me. I shall be commenting on the draft Bill of Rights, hopefully soon.

With best wishes.

Yours sincerely

Professor D J Devine  
Director  
INSTITUTE OF MARINE LAW



Civic Centre  
 12 Hertzog Boulevard  
 PO Box 1694  
 Cape Town 8000  
 Telegr: Citiplan  
 Telex: 52-0966 CEECT SA  
 TOWN PLANNING FAX NO.: (021) 25-4448

Burgersentrum  
 Hertzogboulevard 12  
 Posbus 1694  
 Kaapstad 8000  
 Telegr: Citiplan  
 Telex: 52-0966 CEECT SA



CITY OF CAPE TOWN  
 CITY PLANNER'S DEPARTMENT  
 STAD KAAPSTAD  
 DEPARTEMENT VAN DIE  
 STADSBEPLANNER

DATE: 18-8-93  
 TO: (COMPANY): Propcor  
 FAX NO.: 222626  
 FOR ATTENTION: ALBIE SACHS  
 ORIGINATOR: Stephen Berrisford

**URGENT**

NUMBER OF PAGES  
 SENT (INCL COVER  
 PAGE)

4

MESSAGE: Please forward to Albie  
 as soon as possible.

Albie,

Please find attached a copy of a letter I sent to Thozamile Botha regarding Clause 29 of the Draft Constitution. It reflects one of the concerns expressed at our discussions of 15 July 1993 held at the Cape Town Civic Centre. If you would like to discuss any aspects of this submission please do not hesitate to get hold of either myself or Steve Solomon (my phone: 400-2599(w)/61-5855(h); Steve's phone 400-3620(w)/24-0136(h).

*Stephen Berrisford*

Stephen Berrisford

18 August 1993

**ATTENTION: THOZAMILE BOTHA - URGENT**

Dear Thozi

**COMMENT ON CLAUSE 29 (PROPERTY) OF THE REPORT OF THE  
TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES COMBINED  
REPORTS 10 AUGUST 1993**

Herewith please find comment on the property clause of the Draft Constitution as requested at the Planning and Regulatory Framework for Urban Development Think Tank meeting on Friday 13 August. I am sorry that this has only got to you today but I only found out this afternoon that the original fax I sent to you is still sitting in your office at UWC!

I believe that the proposal set out below is of critical importance for the processes of urban restructuring and will require urgent attention by the Ad Hoc Committee which I hear discussed the property clause this morning. It appears that in the formulation of Clause 29 the Technical Committee did not take into consideration the issue of development rights.

**1. PROPOSAL**

That the wording of clause 29 be changed as follows:

- "29. (1) Every person shall...
- (2) ...
- (3) Nothing in this section...
- (4) Nothing in this section shall preclude measures aimed at regulating the use and development of property where such regulation is in the public interest."

**2. EXPLANATION**

The wording of Clause 29 (Property) is a cause for considerable concern with regard to the distinction made between rights in property (clause 29(1)) and property (clause 29(2)).

Existing Town Planning or Zoning Schemes allocate specific development rights to specific properties. These rights include the right to use the land for a particular purpose and to develop the land to a particular extent, eg permitted height.

These rights are protected in all four provinces by the relevant Ordinances. In each Ordinance these rights may only be taken away where compensation is paid



2.

to the owner of the land<sup>1</sup>. This effectively cripples the ability of planning authorities to influence patterns of development where such rights exist as compensation is extremely costly. The more extensive the rights that an authority may wish to remove the greater the amount of compensation payable will be.

The problems facing our cities today are enormous. Urgent and expeditious restructuring efforts are needed. It would thus be highly inappropriate to give Constitutional protection to some of the greatest obstacles to such restructuring.

## 2.2 The United States' Experience

The experience of the United States is very useful in this regard. The US Constitution states: "...nor shall private property be taken for public use without just compensation." This clause was originally held by the courts to mean that any loss of rights in property, eg development rights, required compensation. It took many years before the courts were prepared to hold that the limitation of an owner's development rights did not necessarily constitute a "taking" of property as referred to in the Constitution.

Now in South Africa we have the opportunity to remove any doubts as to the distinction between development rights and ownership rights. By doing so we will be able to avoid the uncertainty and protracted litigation that occurred in the USA.

We will also hopefully be able to make a substantial contribution towards facilitating the process of urban restructuring.

## 2.3 Why Clause 29 is inadequate

There is thus considerable concern over the wording of clause 29(1) which entitles people to "acquire, hold and dispose of rights in property". This effectively gives Constitutional protection to the holders of development rights. Clause 29(2) entitles the state to expropriate property with the payment of compensation.

Depending on how Clause 29 is interpreted there are two possible consequences, neither of which is desirable. They are either

- 1) A development right is regarded as being one of the rights forming the "bundle of rights" that constitute the traditional notion of ownership. Any limitation or regulation of such a right would constitute expropriation of property and compensation would thus be payable.

or

- 2) A development right is regarded as being something distinct from property as envisaged in Clause 29(2). As a right in property in terms of Clause 29(1) however it is constitutionally protected and thus exempt from any form of limitation or regulation.

<sup>1</sup>. Land Use Planning Ordinance, 15 of 1985 (Cape) - section 19; Town Planning Ordinance, 22 of 1949 (Natal) - section 60; Townships Ordinance, 9 of 1969 (Orange Free State) - section 34; Town-Planning and Townships Ordinance, 15 of 1986 (Transvaal) - section 44.

3

Clearly neither of these interpretations is acceptable in a society where land is such an important and contentious resource.

Development rights are not property rights as such<sup>2</sup> and thus do not warrant Constitutional protection. Development rights are created by the legislature and thus should be capable of being similarly withdrawn or regulated, without the payment of compensation.

It is thus critical that a clear and unambiguous statement is made that permits the regulation of development rights without incurring an obligation to pay compensation. The distinction must be made between expropriation of property that gives rise to compensation and regulation of the development and use of property that does not give rise to compensation. A massive obstacle to such a goal is Clause 29 as it currently stands.

As already indicated (footnote 2, above) the traditional notion of ownership under South African law has been substantially changed. Clause 29 as it currently stands could be seen as a backward step in that it provides such substantial protection to holders of development rights. Moreover, in the unlikely event of there being a return to the traditional, absolutist notion of ownership Clause 29 would then make any attempts at land regulation almost impossible. It would effectively give Constitutional protection to what could then be the Common Law rights of land-owners.

Clause 29 effectively gives the holders of development rights more protection than they currently enjoy.

Should you have any questions or should anything require clarification please feel free to contact me at (021)-400-2599(w) or (021)-61-5855(h) or Steve Solomon at (021)-400-3620(w) or (021)-24-0136(h).

Yours Sincerely



Stephen Berrisford

On behalf of the Cape Town Working Group of the Think Tank

---

<sup>2</sup>. Increasingly the notion that our Common Law gives property owners the right to do with their land as they please is being challenged. Not only is such an approach utterly inappropriate in a society such as ours but its historical legal basis has been shown to be erroneous.