

Dear Albie - Herewith a few preliminary thoughts for your consideration.

MEMORANDUM

Sincerely,
Leonard

SOME THOUGHTS ON THE DRAFT BILL OF RIGHTS

I would like to congratulate the Constitution Committee on the work they have been doing.

In general I consider that the Draft Bill of Rights is well formulated. In this Memorandum I offer some thoughts on the Draft which might be helpful to the Constitution Committee.

1. In my view the primary object of the Bill of Rights is to ensure - as far as is humanly possible and within the limits of human fallibility - that the government of South Africa will be democratic. In other words, that there will in truth be government of the people, by the people, for the people.
2. The bill of rights may - in addition to the primary object - seek to achieve secondary objects, and I therefore see no objection in principle to the inclusion of so-called second and third generation rights. The inclusion of these provisions is necessary to give the Bill of Rights legitimacy in the eyes of the people as a whole.

3. The fact that the so-called second and third generation rights may not necessarily be enforceable in a Court of law does not mean that they are not rights. Rights may be enforceable through other mechanisms, or with the assistance of other mechanisms. I have in mind Commissions appointed either by the Executive or the Legislative, consisting of experts such as Economists. Indeed it may be advisable to make it clear that the Court shall have the power to refer any application relating to second and third generation rights involving a possible expenditure of funds, to the appropriate Commission for a report, before adjudicating the issue.
4. Members of such Commissions should have a status of independence for the period of their terms of office, equivalent to that of the Ombudsperson.
5. In my view the use of Commissions as a mechanism for enforcing, or assisting in the enforcement of second and third generation rights will go a long way to answering the criticism of those who oppose their inclusion in the Draft Bill of Rights. The principle expressed in the maxim ubi jus ibi

remedium does not mean that the only remedy available is an order of Court. Much will depend on what powers are given by the Constitution and the Legislature to the proposed Commissions.

6. In order to achieve the primary aim - as stated in paragraph 1 - it is essential that freedom of speech, freedom of the press and freedom of assembly be placed beyond the power of government to abridge. No branch of government should be given the power in terms of the constitution to abridge the^{se} basic freedoms. In this regard, I quote from a judgment of Chief Justice Hughes.

"The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."

Rosa Luxemburg expressed the underlying thought with great clarity and perceptiveness:

"Without general elections," she wrote, "freedom of the press, freedom of the assembly, and freedom of speech, life in

every public institution slows down, and becomes a caricature of itself, and bureaucracy emerges as the one deciding factor . . . Public life gradually dies, and a few score party leaders, with inexhaustible energy and limitless idealism, direct and rule. Amongst them the leadership is, in reality, in the hands of a dozen men of first-class brains, even though, from time to time an *élite* of the working class is called together in Congress to applaud the speeches of their leaders, and to vote unanimously for the resolutions they put forward."

7. In particular, the Executive should not be given the power, either by the constitution or by the Legislature, to abrogate or suspend the basic freedoms referred to in paragraph 6, on the grounds of "National Security" or in order to proclaim a "state of emergency". The word "security" is a broad, vague generality whose contours should not

be invoked to abrogate or diminish the fundamental rights and freedoms essential to democratic government.

8. In my view in addition to the basic freedoms referred to in paragraph 6, it should be made ^{absolutely} clear that no "state of emergency" will empower the government to resort to torture or detention without trial.

9. The truth of Acton's maxim "power tends to corrupt, absolute power corrupts absolutely" has been demonstrated time and again. There is a continuing potential conflict between the people, and those who are in power. In other words, between those who ^{are} ~~we~~ governed, and those who are governing them (whether the latter are elected, or the non-elected bureaucracy). The Bill of Rights must endeavour to ensure that those who exercise the power of government, remain answerable and accountable to the people. For that purpose the basic freedoms mentioned in paragraph 6 must be guaranteed. There is a natural tendency on the part of Government to impair the effectiveness of dissent. If the Government is given the power, on the basis of a need to provide for a declaration of a state of

emergency to abrogate or suspend the freedom of speech, freedom of the press, and freedom of assembly, and the right not to be imprisoned without trial, then in my view, the efficacy of the Draft Bill of Rights is in grave danger of being rendered illusory.

26/6/91