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Faculty of Law

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 28 September 1993

Ms Melody Emmett
Multi-Party Negotiating Process

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Dear Melody

Re: Proposal for Constitutional Principles Committee

Some ten days ago, before I disappeared for a week to Ghana, I sent you a proposal drafted by Kader Asmal for a section on International Law principles to be included in the Constitution. I asked you to forward it to the committee dealing with constitutional principles. I hope that you have done this.

I have now received a new proposal from Professors G Erasmus (Stellenbosch) and D J Devine (UCT) on the same subject. I have discussed the proposal at some length with Gerhard Erasmus during our stay in Ghana. For what it is worth I think that it is probably a better proposal than Kader Asmal's. Both express the same views but the latter is more detailed and more appropriate for inclusion in the Constitution. Could I ask you to forward this proposal to the committee as well? I think it is wise for the committee to have several proposals to consider.

You may wonder why I am doing the forwarding of such proposals. The reason is that the matter was discussed at a meeting at the International Law Association (SA Branch) of which I am President. I was charged with the task of collecting and forwarding such proposals.

With best wishes

Yours sincerely

JOHN DUGARD

- (3) The executive shall be required to place all international agreements referred to in 2(1)(a) before Parliament within twenty four months.
- (4) Parliament shall have the power and the function, subject to this Constitution, to agree to the ratification of or accession to international agreements negotiated and signed in terms of 2(1)(a).

Commentary

1. The executive should be responsible for the negotiation and signing of all international agreements.
2. Parliament should ratify important international agreements. (This requirement may be dispensed with in respect of executive agreements.) This is a specific choice which differs substantially from the present system. We think it is more in line with true democratic government.
3. All international agreements should be published in the Government Gazette.
4. Purely executive agreements should be possible which do not require parliamentary ratification; otherwise the government will be hampered in cases where expeditious action is required. We have decided against attempting to define an executive agreement. We believe that this matter should be left to the courts to decide on the basis of comparative jurisprudence.
5. There should be a time limit for placing treaties before Parliament. We suggest two years.

PROPOSAL FOR A CLAUSE ON INTERNATIONAL LAW IN CONSTITUTION -
SUBMISSION TO TECHNICAL COMMITTEE ON CONSTITUTIONAL PRINCIPLES -
By M G Erasmus (Stellenbosch), D J Devine (UCT)
and C J Dugard (Wits)

CLAUSE 1 (GENERAL)

1. International Law binding upon South Africa shall, unless otherwise provided for in this Constitution or by express provision in an Act of Parliament, form part of the law of South Africa.

Commentary:

1. We deliberately avoid describing the 'types' of international law, such as treaties, custom etc. All international law binding on South Africa is included. The courts will thus be able to apply all the sources contained in Article 38 of the ICJ Statute and to rule on questions such as the status of treaties, persistent objector issues, opinio iuris, state practice, direct applicability, self-execution etc.
2. By not referring to treaties here, the whole issue of executive and other agreements can be dealt with elsewhere in the Constitution. See infra.
3. We require express legislation before an Act of Parliament can be said to override international law. A clear, manifest intention to deviate from international law must be demonstrated by Parliament.
4. This formulation disposes of the expert witness issue. International law (as part of the law of the land) will have to be argued directly from the bar. (This is, of course, the present position in our law.)

CLAUSE 2 (TREATIES)

2. (1) The Head of State shall have the power, subject to this Constitution, to:
 - (a) negotiate and sign international agreements, and to delegate such power;
 - (b) negotiate, sign and ratify, where required, executive agreements and to delegate such power.
- (2) All agreements referred to in 2(1)(a) and (1)(b), shall be published in the Government Gazette.