



Annual Pluralism Lecture 2016

The Battle for the South African Constitution: Protecting Minorities Through Power-Sharing or a Bill of Rights?

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If you did a paternity test on the South African Constitution, whose DNA do you think would come up? Despite what the speakers have said, it would not be that of Albie Sachs. It would not be that of Nelson Mandela. It would not be that of F.W. de Klerk. It would be that of Oliver Tambo.

My mind goes back to 1988. I still had two arms. We're meeting in a fairly small room, the size of this platform, in Lusaka. Zambian security around in case of commando raids from South Africa to take us out. We're discussing for the first time at a conference of the ANC, constitutional guidelines for a new South Africa. I'm going up to the platform and my heart is going boom, boom, boom, boom, boom. Some of the delegates are in the underground resistance, some of them are military, waiting to find their way back to South Africa. Others are diplomats, others are people giving political support, others are journalists, and I'm anxious. My job— I'd been given the task by Oliver Tambo— to explain through the delegates there to our organization, ultimately to the world, why South Africa needs a Bill of Rights.

There was great suspicion amongst the majority of South Africans about a Bill of Rights. Some of them call it a "Bill of Whites." The fear was we'll get democracy, we'll get the vote, but there'll be a Bill of Rights that will freeze the status quo and give all power to the judges and we won't be able to move forward. I'm being asked now to say why we need, the country needs, a

Bill of Rights. I have three motivations. The first one was easy. It makes you look good. We were being denounced as terrorists. What will happen? You see what's happened elsewhere in Africa? If the Blacks take control, they would just grab everything, look after themselves. There's no future for the whites in that country. That was easily accepted by the delegates there that we want to put on a good face, to be well respected throughout the world. The ANC had actually in 1987, the year before, adopted a Bill of Rights as being part of its policy, and the year before that, multiparty democracy. That wasn't the issue that made my heart race.

The second reason for having a Bill of Rights was more complex and in a way more fundamental. It wasn't just tactical. It was Oliver Tambo's answer to the concept that was being put up to us of power-sharing - group rights - and I think it's important at this conference on, this discussion on, pluralism to see how the concept of pluralism can be abused because they were using the language of pluralism and they was saying we are a minority and that we're using the language of protecting minorities to, in effect, protect the fact that whites owned 87% of the land by law, 95% of productive capital. In South Africa, the minority was the majority and the majority were the minority, so that kind of discourse that favors protecting minority rights was now being abused to maintain minority privilege. His answer was, "We don't want power sharing between racial and ethnic groups in South Africa. We don't want power sharing between whites and blacks. We want a common society of citizens where rights are protected through a Bill of Rights, not because you are white or black or a member of the majority or a minority but because you're a human being."

That was his profound vision and approach. Not to institutionalize race, ethnicity in the structures of governments the way as was being advanced. To recognize pluralism through political pluralism, not through giving forms of autonomy, group rights, institutionalized, constitutionalized around race, ethnicity, language, skin color, whatever it might be. That was the strategic answer and I saw the soldiers and the underground workers and the others all nodding their heads and all very happy that now, the ANC is discussing constitutions, not just strategy of overthrowing apartheid and winning friends, but the kind of country we're going to live in.

But that wasn't why my heart was racing. My heart was pounding because of the third reason. I said we need a Bill of Rights against ourselves. I was fearful. How would they react? It's easy for Albie Sachs, this lawyer, middle class background, comfortable. We're at the cutting face of struggle. We feel the violence all the time every day. Don't come to us with your lawyer's language and beautiful ideas. But instead of any kind of repudiation or rejection, I just saw looks of delight. People knew the countries we were living in in Africa had fought often bravely and nobly for their freedom but the leaders had gone on to become authoritarian rulers. They knew that in practice. Would that happen with us? People have seen inside our own organization completely unacceptable forms of behavior and abuse. Will that happen to us when we're in power? There's always the assumption that we would be in authority. There was a look of pleasure, of delight that we were willing to acknowledge and face up to our own frailties. So when it came ultimately to constitution making, we were very, very aware. You make a constitution not just for your first government, not just for yourselves, not just for the better people in your organization. You're making a constitution for the future.

Lo and behold, when after talks about talks about talks and then talks about talks, finally, we got to talks. Real negotiations. It took us two years. The big clash - and it's not understood even in South Africa and certainly not internationally. The big clash - and just by the way, the kind of legend now is how did South Africa get the constitution? We are told that the marvelous, wonderful Mandela comes out of prison, 27 years, no bitterness in his heart, and he meets the wise, pragmatic de Klerk. They do a deal. They send it to the lawyers to draft a constitution. That's how it came to pass. [Sings] It ain't necessarily so. It just wasn't like that at all. It took us six years. We had breakdowns. We have rally mass action. Chris Hani was assassinated. We almost erupted. There was low grade civil war. People were being thrown off trains. The basic clash was the clash of two completely different visions of what kind of structures of government we would have, and what process should be used to get the new constitution.

When referring to the South African government in those days, we used to speak about the "enemy." Then the enemy became, as we made some progress, the "regime." Then we made some more progress, it was the "bloody government." It ended up with the "other side." Right towards the end, we'd say, "Well, what would the other side say?" Now, the big clash of basic

views comes somewhere between the “regime” and “bloody government” phases. The South African regime is saying, “We must draft the constitution now. The constitution we want will have forms of power sharing.” Initially it was to be between the races, then they dropped it from being between the races overtly to making it between the three leading parties. It just so happened the three leading parties would be the ANC, the National Party under de Klerk, and the KwaZulu Inkatha Freedom Party under Buthelezi. And they said, “We must have three presidents representing the three parties. They must rule by consensus, and we must have a Lower House elected by universal suffrage and the Upper House will be the house of minority parties because everyone knows democrats protect the rights of minorities.” [We called it the House of Losers!] The Upper House would then enable the minority parties to have a veto over matters of deep, special concern to themselves.

It was a disguised form of power sharing on an ethnic basis that would effectively ensure that instead of the constitution being seen as the facilitator of transformation and change and of opening up the doors and access to everybody, it would have been regarded as a barrier to change. The constitution would have been the enemy. The people in the majority would have hated the constitution because it’s preventing us from moving forward even though giving us the vote. We had to blow that – and I don’t like military images ordinarily, but we had to blow that scheme out of the water.

In addition, they said, “We must draft the constitution there and then.” We said, “No.” Only if the people of South Africa as a whole, through mandated representatives, through a constituent assembly which can be our first parliament, drafts a document, will it have meaning for the people and will it have legitimacy. Our people have never been consulted or involved in deciding their fate, their future. Now, the self-appointed group of negotiators is going to decide for them. We said, “We want a two-stage process of constitution-making. We can agree in advance to certain fundamental principles that have to be in the new constitution. We can agree that a two-thirds majority is required. We can agree to have proportional representation. In fact, we even mentioned that there would be no threshold or cut-off points, so that the smallest party would be represented; and we can agree to have a constitutional court set up which will decide whether the principles had been complied with or not.” This is a South African invention which would work,

but the regime would not accept it. There was a massacre. The ANC said, “Until the massacres stop, we can’t carry on negotiating anymore.” Eventually, after some months of very tough, confidential negotiations, the regime accepted the basic two-stage mechanism for going forward, and South Africa got an interim constitution which led to elections in 1994, Mandela becoming President and a final constitution in 1996.

Miracles – we have told it was a miracle. Miracles are not made of minutes and matters arising, and agendas, and one report after another report after another report. We worked very hard, very intelligently, creating new modalities as we went along to finally get the consensus document that enabled us to succeed through the two-stage process. We elected the parliament. Parliament is now given two years to draft a constitution, complying with the 34 principles agreed to in advance, and I always mention, of course they worked until late in the afternoon on the last day of the second year, and luckily, 1996 was a leap year so they had one extra day.

It was sent to the Constitutional Court and to the dismay of my former comrades in negotiations and in the struggle in the trenches, we declared the constitution to be unconstitutional. Overwhelmingly it complied, but in nine respects, it didn’t. For those who had been following South African events recently, you might be interested to note I checked up recently to see what the nine factors were, and one of them involved the powers of the public protector. The relevant principle agreed to in advance said that the public protector and the auditor general, belonging to a group called Institutions to Protect Democracy in the Constitution, must have their independence safeguarded. The draft text said it’s safeguarded by a 50% majority that parliament needed to dismiss them. The court said, that’s not sufficient safeguarding. The requisite majority went up to 2/3 and possibly, if it hadn’t been 2/3, the public protector whose report led to President Zuma apologizing, a crisis inside the ANC, huge popular support for the independent judiciary that made that pronouncement, maybe she wouldn’t have been there, and there wouldn’t have been the report at all.

You will note that we rejected pluralism in the sense that it was being advanced, even when using the language of consociationalism, as the concept was called. We refused to accept the idea that the different groups in our society created by our history, often in tense relationships, should

be represented as such and try to find agreement in Parliament and at the executive level in government. But we accepted pluralism in the sense of the constitutional recognition of the diversity of our nation and through the Bill of Rights, through language rights, through devolution, directly and indirectly we gave massive respect to pluralism. At the same time, we're trying to unite South Africa which was fragmented under apartheid. We want a united country, not a unitary country necessarily, but a united country, a united country. And in our preamble, it says, "United in our diversity." South Africa belongs to all who live in it. United in our diversity. That's the fundamental theme of our constitutional endeavor.

Diversity doesn't destroy unity, but true unity depends upon acknowledging diversity. It's not a unity that's imposed. It's a unity that's felt, enjoyed and realized by the people who are affected by it.

I'm going to give you two examples of how that principle of unity in diversity operated in practice in the Constitutional Court. The first has been controversial in many countries, and certainly it has been here in Canada, and it's the very vexed issue of customary law and gender equality, the relationship between the two. I'm not sure if it was the Lovelace Case in Canada. People felt we had to choose. Are you on the side of recognizing aboriginal autonomy in decision-making in which case it was seen that women came off very, very badly, or are you on the side of gender equality? You had to choose.

We acknowledged tensions, but we tried to resolve them not through suppressing one dynamic, one element, for the one to win, the other loses. Rather, we sought to find a mechanism for actually reconciling the two elements in a principled way in three important cases that came before the Constitutional Court.

The first was the Bhe case where a man died. He and the woman he'd been living with, they had two daughters, in a small house. The man's cousin comes along and says, "I'm going to sell the house to pay for his funeral." It was shocking. His daughters had to leave because he hadn't been formally married. The mother had no formal rights under traditional law, customary law, or under the common law. The matter comes up to our Court. The other courts had been saying,

“That’s tradition. The constitution recognizes customary law. There’s also a right to associate with others to promote language, culture, religion.” Putting the right to culture together with the recognition of customary law, the courts were saying, “Too bad for the children. That’s the custom.” It came to us – we said that the principle of primogeniture violates the Bill of Rights. The argument that the eldest, closest male relative inherits is unfair, it’s unjust, and it violates the principle of equality in our bill of rights. My one colleague said, “Let it be the eldest child who inherits in which case.” It could be a girl child, the daughters would have inherited. But most of us felt the issue was too tricky for the Court itself to develop the solution. We were not against customary law. There’s so much in customary law that is positive and affirmative and brings about social solidarity. Something which, in fact, our whole society needs... Ubuntu. A deep philosophical principle in African culture which I believe is the source of the things that people admire in Desmond Tutu and Oliver Tambo and Nelson Mandela. I’m a person because you’re a person. I can’t separate my humanity from acknowledging your humanity. It’s not only customary law that needs that, we all need it. In fact I’d say the whole world needs it. In Canada, it was Supreme Court Justice Charles Gonthier who was speaking about fraternity, what’s happened to fraternité, he asked. That element that’s been excluded from that sense of human solidarity that gives context to liberty and equality? It’s very strong in African customary law and Ubuntu is something I think that needs to be retained and built on, not struck down.

The next case dealt with the rights of African women on divorce. What was called the Natal Native Code for Zulus said that it’s the husband who retains the family property, the husband has the marital power, and the husband controls everything. If the wife wants to divorce, it’s tough luck on her, she can go back to her own family. She can get a divorce but she doesn’t take any property with her. We said that was unconstitutional, and in doing so we developed the concept of living customary law. Customary law is not something ahistorical, decontextualized, a set of rules for all time. Customary law belongs to the people. It evolves as the people’s lives change and notions evolve. And African women are now earning. They’re independent, they’re strong, they’re citizens, they’re voting, they participate as equals in public life, and it’s absolutely inconceivable that customary law can’t be seen as evolving in a living way to keep up with and respond to changing circumstances. It is Black women who are part of the African

society who are now demanding equality in terms of customary law that affects their lives so much.

The third case was that of Mrs. Shilubana who'd been chosen by the Baloyi Community to be their Hosi, their king – their chief. The royal family wanted her. The community meeting wanted her, and even the incumbent at that time, who was very ill, said she was the right person. But just before he died, the incumbent said, “No, no, no. I made a mistake. It's my son.” The state appointed her, recognized her. The son went to court, and the judges said, “You can't be chosen as a chief or king. You are born a chief or a king.” That was their position. The Supreme Court of Appeal agreed. The matter came to us. The Court was packed. Women came down in buses and one busload sat in the court from 10:00 to 11:15, then went out, and the other busload sat from 11:30 to 1:00. The case went right through the day. It was very moving for me. It was wonderful to see the people packing out the court. In the end, our decision was based on the principle of customary law being a living phenomenon. It's evolving. Even if there was a situation before where women couldn't be the leaders, the heads of the African communities, customary law now had changed. This was not a case of the state telling the community, “You must have a woman for purposes of equality.” The community itself wanted it and it had been the judges in the lower courts saying, “You can't have what you want because of this particular inflexible rule of customary law.” The theme of living customary law is very productive. It's very rich, and it enables you to respect the democratic aspects of customary law. For millions of people for whom it's much more real than a marriage certificate you might get before some state official. It goes back deep into their society, their culture, their custom, relationship between families, but at the same time, it's not static. It moves with the new values of a new society.

The second case I mention became quite well-known internationally. It's the Fourie case, dealing with same sex marriages. I'm mentioning it because if any case dealt with the right to be different, explicitly, strongly, powerfully, it was this one. The whole case turned on the right to be different. Not just to be tolerated, to be different, something much stronger, much more affirming. Toleration in that sense is, “Okay, you can have your relationships in private.” The right being claimed by same sex couples was the right to express your love, your commitment or association on an equal basis with equal dignity. The reason I mention it today was because of

what I found necessary to say in the judgment, which I read for the Court, on the relationship between the sacred and the secular. I made a statement which I picked up from a colleague of mine who was deeply religious, I am, if you can be deeply secular, I'm deeply secular, saying, "Don't call opponents of same sex marriages bigots. That's their world view. That's their belief. But don't allow them to force their beliefs on people who see life differently. That can't be the basis of the civil rights of the rest of the society."

I spoke about the co-existence between the sacred and the secular, and I think that's much more powerful than drawing a cultural line that declares that we are the enlightened, they are the benighted, and we're going to push the line of progress and enlightenment further forward.

The result was an extraordinary degree of acceptance by faith communities in South Africa. They weren't being clobbered. On the contrary they were just being told that within your communities, within your faith communities, you're not compelled to celebrate marriages that go against your beliefs. The judgment even mentioned something relevant now to debates in the United States, namely that Parliament, in passing the necessary legislation, could decide that marriage officers who had genuine reasons of conscience not to wish to perform those marriages, shouldn't be compelled to do so. My reason for writing that was partly to avoid the centre of constitutional concern in the whole debate being the marriage officers and their rights of conscience, rather than the same sex couples who wanted to express their love and commitment in a public way. It shifts the battle to a very unfortunate, unnecessary area. It wasn't only that. It was also the idea of being married by somebody who loathes the ceremony was a factor to be considered. But also belief is belief, it's in your head. It's true that people can't make laws for themselves. They can't carve out exemptions simply because of their beliefs if the law isn't targeting them in particular but in its generality happens to affect them. At the same time, we declared, the state is under a duty to do everything it can to avoid subjecting people to a hard choice between their consciences on the one hand and the law on the other. A form of reasonable accommodation. The legal culture we grew up in is not comfortable with reasonable accommodation. It likes bright line classifications, but we need to have decriminalization, reasonable accommodation, a whole lot of softening factors that allow us for the fluidity,

mobility that belongs to ordinary life. Reasonable accommodation and cultural and religious pluralism go well together.

Houston, I had a problem. I'm coming to the end of my presentation, and I want to end it by making a presentation. Let me tell you the problem I had, and the education I underwent in resolving that problem. I sent an email to my wife last night. "Darling, you know I'm a very staunch Republican. I don't like titles. When it came to the Constitutional Court being established, we decided we don't want to be called 'My Lord' or 'My Lady.' We're not even called 'Honourable.' It will be difficult for me to use the appropriate form of address to the person to whom I want to hand the most precious product of South Africa. It's not gold, it's not diamonds, it's not even platinum. It's our Bill of Rights." Maybe, Calina can stand up and just show it to the people. Don't hand it over yet. We are so proud of this document. Thank you.

I found it so interesting to see how from breakfast time until about an hour ago, my thought processes developed on how to solve the problem I had created for myself. The first step was to say, "Well, come on, Albie, you know, it's protocol, it's good manners. Do it." But I've spent most of my life fighting against protocol. I could do it, but it would be without grace. Then the next step was to say, "Well, I'm in his house. I'm in his home, the place named after him, and be a gracious guest respecting his title." I felt actually you can't give something just to be gracious. You give something – you don't have to give it - if you're going to give it, it's got to come from the heart.

Then, the way discoveries are made, just suddenly, "of course, of course. I'm not giving this document to a titled individual. I'm giving the document to the head of an extraordinary community with a long, long history. Through that person, I'm linking up with a community and the deeds that are being done in the name of that community, and that's something very beautiful. It's very beautiful. I'm overcoming in that sense, getting beyond the reticence of my egalitarianism, but not because I'm forced to, or I'm being polite or gracious. I think it's actually rather lovely that I'm, as it were, leaping out of my particular circumscribed world view, which I will defend, if I'm compelled and obliged to bend the knee and show respect. I'll fight against that, but I'm doing it voluntarily and I'm doing it because I've just enjoyed this whole

experience of being here and reading the book and listening to what the Centre is doing.” What I’m going to do now is – if we can go down together. Please don’t get up.

Now, I’m going to ask you to stop clapping, please, because I want to say something that I’m going to say with joy. “Your Highness, please accept South Africa’s most precious gift to the world and to yourselves. Thank you, Your Highness.”