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THE CREATION OF SOUTH AFRICA'S CONSTITUTION

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I was delighted when I learned that my future clerk, Marco Masotti, who is coming to join me in Johannesburg next year, managed to contact Steve Ellmann and arrange this meeting, because Steve Ellmann has been one of those persons who has followed the evolution he's been speaking about, and with great sensitivity and great support. There is a tendency for American scholars to assume that another country would only want to adopt the wonderful human rights and governmental schemes found in this country, and if only we and China and the rest of the world did so, what an honest world it would be. There are many others who are so modest and bashful about the American reality that they almost advise us to "avoid everything we've got here, whatever you do, rather than make our mistakes." However, Steve just came on to the scene in terms of the kind of dialogue that I find most fruitful: discussing things; analyzing, that is, bringing his own insights and experience to bear in his analysis; but listening to us; and being sensitive to what we were trying to do and understanding the kind of people we were. So thank you very much.

About one month ago, the Constitutional Court of South Africa declared the Constitution of South Africa to be unconstitutional,[1] which I think is a unique jurisprudential and political event in the world. This afternoon I want to explain how this unusual thing came to pass.

We go back to 1990. We have to shift our country, which at that time was the epitome of division, repression, and injustice, a point of reference for anybody who wanted to condemn anything in the world. It was the country that introduced the word "apartheid" to the English language and to international human rights discourse. It was a country that sent death squads across its borders to hurt and to torture people to death and that had an organized system of repression that extended into every village and into every nook and cranny of society. It was a country that was racist, authoritarian, and narrow. This very South Africa had to be converted into a country—with the same people, the same physical terrain, the same resources, and the same buildings—into a country that was democratic and respected human rights. It had to be a country where people of widely different backgrounds would respect each other, where

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1. *See* Certification of the Constitution of the Republic of South Africa, 1996 (Constitutional Court of South Africa, Case CCT 23/96, Sept. 6, 1996) [hereinafter First Certification Judgment] (on file with *New York Law School Law Review*); *see also* Lynne Duke, *South African Court Orders Revisions in Proposed New Constitution*, WASH. POST, Sept. 7, 1996, at A18.

everybody could live in dignity, and where social peace prevailed. This was not a small task. Whereas before, we had the hour of the politician and the hour of the soldier, now we had the hour of the lawyer. This was our big moment. And for some things you have really only one chance; for us it was this moment—quite a long moment—and we had to make the best of it.

We spent the year of 1990 involved in what we called, "talks about talks about talks." We first talked about removing the obstacles to get to "talks about talks." Removing the obstacles meant releasing the political prisoners, unbanning the suppressed organizations, allowing the exiles to come back, and guaranteeing free political activities—that is, we "leveled the playing field." We used that image over and over again; you would have thought the whole of constitutional discourse consisted of playing fields and goal posts and leveling and shifting.

Once the basic process of removing the obstacles to negotiations had been completed, we could get involved in "talks about talks." This meant talks about the format of negotiations, who would be involved, how decisions would be made, and what the agenda would be. All this had to be prepared, and we spent an entire year involved in arguments, debates, discussions—both public and private—on that particular topic alone.

Finally, at the end of 1991, the first meeting of what was called CODESA, the Convention for a Democratic South Africa,[2] began. We immediately saw that there were two main blocs and two major strategies. One bloc consisted of groups already involved in the government, or who were involved in the former structures and institutions of political society in South Africa, sometimes in an opposition mode: the South African government, the Inkatha Freedom Party, the Democratic Party, and various Bantustan administrations of the so-called self-governing homelands in the independent states created in terms of the apartheid philosophy.

That was one major grouping, and their position was that "we accept that there has to be change in South Africa, there has to be democracy, we can't avoid—even if we wanted to—universal suffrage, *but* we can't hand our country over to majority rule, for this is going to mean that our basic rights are going to be denied." And with a sudden surge of empathy, they insisted that if they were in the shoes of the disenfranchised, they would be vengeful and they would do unto them what they had done unto us.

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2. The Convention for a Democratic South Africa, abbreviated CODESA, was the name given to formal talks which began in late 1991 and brought together representatives of the Government and nineteen political groups. *See* Ibrahim J. Gassama, *Reaffirming Faith in the Dignity of Each Human Being: The United Nations, NGOs and Apartheid*, 19 FORDHAM INT'L L.J. 1464, 1516 (1996).

Accordingly, constitutional protections had to be erected there and then so that when democracy came to pass, their fundamental rights would be preserved. The net result was the insistence that it be all those in the negotiation forum who had to draft the new constitution, around the table, with lots of give and take and horse-trading and so on. Then, finally, to get legitimacy, the negotiated document would be put to a public referendum so that the nation could be involved and give its imprimatur.

The other grouping, in which the ANC was the most prominent participant, said no. They argued that the basic problem all along in South Africa had been the complete failure of self-determination. A small group of the population had always arrogated to themselves the right to determine the fate, destiny, and citizenship rights of the rest of the population. If the self-appointed negotiation forum continued in that tradition, there would be no legitimacy to the document that emerged from that process, simply because it would perpetuate the same style of governance. In order to gain legitimacy, the body that drafted the constitution also had to be legitimate. Thus, it had to be a body mandated to act by the entire nation. That is, it had to be a body mandated through a general election involving the whole nation with authority to draft a constitution for the new South Africa.

So here we had two apparently completely incompatible strategies, and the question was how to resolve them. Well, we discovered that there's no problem that lawyers make that lawyers can't solve—fortunately. You can't just give up and say, "It's a pity, it's a draw, and we abandon the contest." Our solution was based on two assumptions. Firstly, the group that insisted on a legitimately created body adopting a constitution had to understand the anxieties of the various minority groups. Whether their fears were justified or not, whether they were realistically founded or not, the fact was that those minority groups were scared. When people have guns and the capacity to destroy the whole process, whether you like it or not, you must deal with them as they are, and take their anxieties seriously.

So that was the first basic theme that had to be accepted, together with the fact that the minorities were part of the nation. People must learn to live together. There must be an inclusive process where people do not feel that the constitution is something forced on them—you should never suffer from a constitution, you should always enjoy a constitution. People should feel that they are protected by it, that they have contributed to its development, and that their specific interests and needs both as citizens and as groups are addressed by it. After all, a constitution is not a declaration of victory or a proclamation of the triumph of the strongest factor. On the contrary, it must speak for the whole nation.

On the other hand, the minority groups also had to acknowledge and understand that this theme of legitimacy was not simply a trick in order to depress the scales in favor of the ANC. It was a fundamental element

of the psychological, cultural, and historical transformation that the country needed. Those groups also had to understand that if you can make a constitution by doing deals, sitting around a table, you can unmake a constitution in the same way. It could result in a precarious situation, for the new constitutional order, leaving it without the sense of destiny and historical evolution, intensity, or drama that one needs for an event of this kind. Writing a constitution is much more than simply drafting a beautiful document; it is a participatory process where members of the nation feel they can identify with the outcome, and that they are involved in its ultimate shape.

The way we resolved the apparent conflict between the two, then, was to get each side to accept the fundamental thrust of what the other side wanted. The first group, which I will call the minority group, wanted guarantees that the final document would be a document that would be democratic, would guarantee fundamental rights, including freedom of expression, and all the things one associates with a contemporary constitution based on freedom. However, they also wanted a guarantee that their particular interests would not be completely crushed by some kind of majority-rule steamroller. They had concerns about such matters as language and religion, about property being dispossessed without any criteria being used, and about revenge. Yet eventually they acknowledged that the only way to achieve legitimacy for such a constitution was through a general election. Therefore, the agreement, the "compact" as we call it, was, first, that an elected body—with the authority and mandate given through general elections—would draw up the constitution. Secondly, this elected body would do so in terms of a number of principles predetermined at the negotiation phase. The principles, which finally amounted to thirty-four, guaranteed that certain fundamental interests and preoccupations of the minority groups would be catered for.[3]

This was not a deep concession on the part of those who wanted general elections. If I might use the word "we"—at that stage, long before I became a judge, I was a member of the constitutional committee of the ANC and very active in this process—we wanted a democratic constitution. We wanted a Bill of Rights. We wanted language, cultural, and religious rights to be protected. We wanted everybody to feel at home in this new South Africa. We wanted to establish that it was a terrible, bitter and costly myth that people of different backgrounds, culture, appearance, and race, could not live together as equals respecting each other in one country. It was important for us.

So we agreed to the principles, in principle, without difficulties. When it came to the letter of the principles, however, the minority group

3. *See* Constitution of the Republic of South Africa, 1993 (as amended), Schedule 4 ("Constitutional Principles") [hereinafter Interim Constitution].

wanted to pack as much into the principles as possible; in effect, partly writing the constitution at that stage. We, on the other hand, maintained that as much as possible should be left to the discretion of the legitimately established body. We ended up with thirty-four principles—a large number of principles—some of which contained a number of sub-clauses. There is a lot of detail in the principles because this was our modality for making everybody feel comfortable with the proceedings and ensuring that no one felt the constitution was a result of the triumph of one section of society over another. The next question was who would decide if these principles had been complied with. That is where the Constitutional Court would come into play.

Basically, then, the first stage was the creation of a constitution in order to write the constitution. In the interim period, however, it was necessary to have a Parliament that functioned with legitimacy. It was necessary to have an executive answerable to the Parliament. It was necessary to have a Bill of Rights to ensure that we started off on a clean foundation. So we had a fairly extensive interim constitution—much, much longer than yours—and the basic institutions of democracy were created at that stage even before the final constitution was drafted.

The critical period was that covered by the three days of the general elections.[4] For the first time, all South African adults were equal and had a chance to vote. Americans have the opportunity to vote, but normally do so perhaps at a rate of only fifty or fifty-five percent.[5] Over eighty percent of the eligible voting population voted in our general election.[6] I imagine that figure will drop, but it was enormous at the time and the people stood patiently in the lines at the voting booths and felt pride in the fact that it was being done peacefully. The sense of the unity of the nation was very powerful on those days. It validated the whole process. This participation gave approval to what was happening in a way that nothing else could have done. The whites had voted since 1910 or even since the 1850s—at first only white men, later white women as well. Black people had built the polling booths, swept them out, and probably carried the voting urns afterwards; but they could not drop the piece of paper in to vote. Now, for the first time, both white people and black people—South Africans, citizens—were all expressing, in secret, our preferences concerning whom we wanted in Parliament.

The Parliament had a triple function. The first was to choose the president. It was a deliberate option on our part not to have a directly

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4. The general elections were held on April 26-28, 1994. *See* Dele Olojede, *And on the Third Day, Most of South Africa Rested*, NEWSDAY, Apr. 29, 1994, at A15.

5. Average voter turnout in recent elections in the United States is 55%. *See* Robert Kilborn, *The News in Brief*, CHRISTIAN SCI. MONITOR, Nov. 1, 1996, at 2.

6. Voter turnout in South Africa's first elections was 84%. *See id.*

elected president.[7] Technically, I suppose, we wanted to avoid gridlock. We wanted to avoid the situation in Latin America, where two separate sources of public authority, president and parliament, are both elected. Frequently, in this circumstance, institutional dissension causes governmental paralysis, which then causes the army to step in, and democracy is destroyed.

I think we were also cautioned by the history of our own country. We had a tradition of colonial rule with a highly centralized government and power vested in the governor. We also had a past in terms of which traditional leadership of indigenous society had been incorporated into the white power structure in such a way that the democratic aspects were minimized and the autocratic aspects were maximized, for purposes of indirect rule. Pretoria, ruling through the chiefs, could dominate the population more easily. That was another authoritarian tradition. And we had a third tradition, that of underground resistance, where decision-making was highly centralized and discipline was tight. These three separate traditions, brought together, created the recipe for highly authoritarian, centralized government. We had to be on guard against our own history.

Therefore, we wanted our President to be answerable to Parliament, and we wanted Parliament to be the repository of the public mandate. The President had to know that he or she was elected and chosen by Parliament and to be accountable to the members of Parliament. Moreover, the President was to choose the members of the Cabinet from Parliament, so that they, in turn, would have to answer the questions and endure the scrutiny of Parliament.[8] So that was the first function. I will not give you a prize if you guess who was chosen to be the first president.[9]

The second function of Parliament was to pass laws. Parliament consisted of a national assembly of four hundred persons, elected by proportional representation on national and provincial candidate lists, as well as a senate of ninety persons, who were nominated by the nine provincial elected legislatures (ten from each of the nine provinces).[10]

Sitting together, these two bodies constituted the Constitutional Assembly, and in this capacity, Parliament had a third function—to draw

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7. *See* Interim Constitution, *supra* note 3, § 77.

8. On the process of selection of cabinet members, see *id.* § 88.

9. For a detailed description of Nelson Mandela's historic appointment to the presidency, see generally, Daisy M. Jenkins, *From Apartheid to Majority Rule: A Glimpse Into South Africa's Journey Towards Democracy*, 13 ARIZ. J. INT'L & COMP. L. 463 (1996).

10. On the composition of Parliament, see Interim Constitution, *supra* note 3, §§ 36, 40, 48. On Parliament's law-making authority and processes, see *id.* §§ 59-63.

up a new constitution.[11] The Constitutional Assembly had two years to complete that function.[12] These were two rather extraordinary years. The process was probably far more self-conscious than is normally the case, in the sense that everything was videotaped and put on the Internet. (Can you imagine the Philadelphia Convention on the Internet?).

Another reason for all this was to muster extensive public involvement, which may also be unique to our country. There were weekly television programs dealing with major issues being debated by the assembly. For example, the Constitutional Court had ruled, while the Constitutional Assembly was deliberating, that in terms of the Bill of Rights of the Interim Constitution, capital punishment was unconstitutional because it violated the prohibition of cruel, degrading, inhuman punishment and the right to life.[13] The Constitutional Assembly held a debate on whether capital punishment should be restored. It was not purporting to refuse to follow the decision of the Constitutional Court, but to consider rewriting this facet of the constitution so as to produce a different result. The Assembly was free to develop any provisions as long as they complied with the constitutional principles.[14] You can imagine that capital punishment is an issue that arouses fierce passions in our country as it does here. (I might mention that on the third day of our oral arguments, the Attorney General for the Transvaal, who argued the case for the retention of capital punishment, kept turning around waiting for a piece of paper to be given to him—the kind of scene you might see in the movies. Eventually, the piece of paper arrived, and, with a big smile of triumph on his face, he said, "I just received a fax from New York, and New York has reintroduced capital punishment.")

In any event, many passionate issues were debated. People were told that "this is going to be your constitution. We're not taking a poll, we're not counting heads, that's a different process altogether. We are simply making you aware of the sorts of decisions that have to be made down there in Cape Town, in Parliament." Throughout the life of the Constitutional Assembly, approximately two to three million petitions, comments, objections, and proposals were received from the public. Many of them were organized signature campaigns for language rights and so on, but they also came in from all sorts of bodies from all over the country, some very erudite, and some expressed in very basic language. Towards the end, four million copies of a document of the Constitutional

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11. *See id.* § 68.

12. *See id.* § 73(1).

13. *See* S v. Makwanyane and Another, 1995 (3) SA 391 (CC).

14. *See generally* Peter Nourbert Bouckaert, *Shutting Down the Death Factory: The Abolition of Capital Punishment in South Africa*, 32 STAN. J. INT'L L. 287 (1996) (discussing the South African debate on the death penalty).

Assembly were published, explaining the constitution in lovely cartoons and simple language. For people to understand the draft of the constitution, all they needed to do was to read these simple explanations for the meanings of "separation of powers," "independent judiciary," and the "devolution of power to the regions." All the basic elements of the constitution were presented in a very accessible form, and these papers were distributed throughout the country.

The Constitutional Assembly had two years to complete this task, including one extra day because of a leap year,[15] and that last day really counted, because all of the most difficult issues were left right to the end. However, in the end the deadline had to be met, and finally, a new text was ready. The next step was sending the text to the Constitutional Court. The Constitutional Court had to decide whether or not the text complied with the thirty-four principles. That was a job given to us not in terms of some common-law jurisdiction—which we didn't have—but by the Interim Constitution. Both the Constitutional Court and the Constitutional Assembly were creatures of the Interim Constitution; we did not predate the constitution, and our powers and authority came solely from the Interim Constitution. That constitution required us to certify that the new constitutional text complied with the thirty-four principles;[16] hence our competence to declare the constitution unconstitutional.

I was put in charge of logistics. We had to make room for up to twenty-four counsel at a time in a relatively small courtroom. We put all the tables that we could find in a row in the front of the room to accommodate them. We had to arrange space for the press, and we packed in as many seats as possible for them and for the public. We allowed, very unusually, television cameras into the courtroom. The cameras were allowed not to broadcast directly to the public—any of my colleagues who might have been considering allowing cameras for direct public broadcast decided that was not a good idea after watching the O.J. Simpson trial—but, rather, to ensure that our proceedings were recorded and would be part of the country's annals, and so that we could be seen as part and parcel of that great family of the fathers, mothers, brothers-in-law, and nephews and nieces of the constitution. The television coverage also enabled the public to see us in our gowns, deliberating, while a narrator provided a voice-over summary of what happened each day; it made the experience a little bit real. It was a judicial compromise between banning TV altogether and allowing what people feared would be forensic performance and play acting for the television. It also allowed us to provide an overflow room, so when the courtroom was packed,

15. *See* Interim Constitution, *supra* note 3, § 73(1).

16. *See id.* § 71.

other people could still come and watch the proceedings. (In practice, the smokers all watched from there while they smoked.)

We received over ninety objections from the major political parties in Parliament, parties outside of Parliament, organizations, agricultural unions, concerned Indians of South Africa, Business South Africa, the Congress of South African Trade Unions, people defending intellectual property, the police force, magistrates, individuals, the Free Market Foundation, and many other groups. A number of Christian organizations also made objections in quite a forceful manner. Participation was widespread from civil society as well as from organized political organizations.[17]

The Constitutional Court had to organize a calendar. We introduced, for the first time, little lights to control counsel: green, five minutes to go; amber, two minutes to go; red, your time is up. We had nine days of hearings that were very complicated, very intense, and covered the entire ground of what a constitution is, what it can be, what it ought to be, what international practice is, what the principles require, and how to interpret this text of over two hundred articles that comprised the new constitution. We started off with eleven judges—a full bench—and at this great historic moment, not to be repeated in our judicial lifetimes in quite the same way, one of the judges caught German measles and he had to drop out. So the ten of us carried on, and we worked around the clock for two or three months until, finally, we had answered all the questions, responded to all the objections, and had our judgment ready.

Our basic decision was to give what we called a "continental-type response," and not the full-flowing, sophisticated, precedent-based analysis that an ordinary judgment would have. We wrote more laconically in part because we had to cover everything. We were also very aware of the fact that our decisions would be binding in the future, and that here we were, most unusually, interpreting a constitution from beginning to end and already establishing perspectives and fundamental interpretations. So we were reluctant to go beyond the absolute minimum necessary to answer the questions that were asked.[18]

We went over our decision again and again, restructuring it, changing the sequence, refining paragraphs, discussing, and discovering things that were just wrong. Eventually, we decided that enough was enough. The public was waiting, and the longer the jury was out, the more heightened the expectations became. We announced in advance when judgment would be delivered, and the courtroom was packed—even the smokers delayed going out to hear the outcome that we pronounced. Arthur Chaskalson,

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17. *See* First Certification Judgment, *supra* note 1, ¶¶ 22-25 and Annexure 3 ("Summary of Objections and Submissions").

18. *See id.* ¶ 3.

who is the President of the Court, delivered the judgment on our behalf and read just the last page. He was very solemn, and I think it was very strenuous for the people from the Constitutional Assembly who had defended the constitution, because what they heard was just those aspects where we held that there had been a failure to comply with the principles. Someone said it was like the death penalty being reintroduced. There was a sense of gloom at that particular moment on the part of those who were hoping that we would pass the whole of the constitution or more than we did.

We held, for example, that the requirement in Principle II that all universally accepted fundamental human rights had to be "entrenched" in a justiciable Bill of Rights meant that something more was required than simply putting the rights in the constitution and making them revocable with the same two-thirds majority that sufficed to amend any other part of the constitution. It had to be more than just in the constitution, it had to be entrenched in the constitution. This decision turned partly on the meaning of the word "entrenched," but there was a philosophy behind that. The Bill of Rights is so important and is meant to be so enduring, unlike the structures of government that you can adapt and modify in the light of experience with relative ease, that something more was required than just a two-thirds majority.[19]

There was also a principle, Principle XV, that dealt with the amendability of the constitution. This principle required special majorities and special procedures to amend the constitution, but all that the new text did was to call for approval of amendments by a two-thirds majority. We said that it had to do that, plus some special procedures to ensure time for reflection. We did not specify what such procedures had to be, but we were concerned that there should be clear notice that what was being considered was indeed a constitutional amendment, so that it could not be adopted by accident, but done purposefully with everybody understanding what was involved.[20]

There were also a number of institutions that were referred to in the text as institutions intended to protect democracy. One was the Public Protector. We couldn't agree in the negotiations whether we should have an "ombudsman," an "ombud," or an "ombudsperson," so we ended up with a public protector. This official's job is to watch the government and prevent nepotism, corruption, and abusive behavior toward its citizens. That is a key position, particularly in the new venture in democracy (though really in any other democracy as well). Principle XXIX said, in essence, that the public protector's position had to be safeguarded in the constitution. The safeguard given in the draft constitution was a

19. *See id.* ¶¶ 157-59.

20. *See id.* ¶¶ 152-56.

requirement that fifty percent of the total membership of the National Assembly had to support a resolution directing that person's dismissal. Yet we decided that was not enough, particularly because a public protector could be investigating the activities of members of Parliament and cabinet members who were in Parliament. Something more was required.[21]

The same applied to the Auditor General, who looks at the books. Something firmer than what was granted had to be in the constitution to protect the institution, so that whoever filled that position would know that he or she could not easily be dismissed for investigating the affairs of the administration.[22] A similar problem arose in relation to the Public Service Commission, which was rather poorly defined in the constitution. Without knowing what its powers were, we could not say that it was being safeguarded.[23] So these were all means whereby the Court insisted on ensuring that the constitutional text and the people there to protect the constitution had entrenched positions.

We also had an enormous controversy in our country over the labor law provisions in the Bill of Rights. The clause that was adopted said "[e]very worker has the right . . . to strike."[24] A group called Business South Africa argued that if the constitution contained the right to strike, it must have the right to lock-out as well. They felt that the absence of the right to lock-out constituted non-compliance with universally accepted principles of fundamental human rights, in violation of Principle II. We rejected that argument partly because the right to collective bargaining was enshrined, and that would include, in appropriate circumstances, the right to lock-out. Lock-outs were not, by any means, prohibited. Moreover, the only weapon a worker has is the withdrawal of labor. In contrast, employers have property rights and a whole range of options in labor-management conflicts, just one of which is the lock-out, so that this particular option does not have the same vital importance for them. On this score, we had some very pertinent German jurisprudence to help us. As you can imagine, COSATU, the Congress of South African Trade Unions, was elated. Not only did this decision maintain what for them was an important functional right which the Interim Constitution had entrenched and protected, but also, symbolically, I would guess it meant

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21. *See id.* ¶¶ 161-65.

22. *See id.* ¶¶ 164-65.

23. *See id.* ¶¶ 170-77.

24. This language, which was retained in the version of the constitution later approved by the Constitutional Court can now be found in S. AFR. CONST. § 23(2)(c).

an enormous amount to them as a demonstration that this constitution speaks for them and their particular interests.[25]

Not exclusively, however. In another respect, we found the labor law provisions of the constitution flawed. The problem was that although the draft constitution guaranteed the right of employers to bargain collectively, it guaranteed that right only to employers as members of "employers' organizations."[26] We held that this was in violation of Principle XXVIII, which required protection of "the right of employers and employees . . . to engage in collective bargaining." In other words, single employers cannot be compelled to bargain through a centralized bargaining structure. Whether the principle was wise was not for us to say; that was what the principle said, its meaning was very clear, and we had to give effect to it. So Business South Africa was very happy with that. We did not set out to give one to the workers and one to the bosses. It just turned out that way, I swear.

There is another clause that, for all sorts of reasons which were not very clear, said that the existing Labor Relations legislation would be protected by the new Constitution.[27] In effect, the Act would be regarded as part of the Constitution until it was amended by ordinary legislation. We held that this was an attempt to protect the Act from constitutional scrutiny and judicial review. We declared that every single clause of that Act had to be subjected to review as against the principles, and that the Constitutional Assembly could not immunize it from ordinary constitutional review by incorporating it by reference into the Constitution. We said the same in relation to the Promotion of National Unity and Reconciliation Act (the amnesty act)[28] where an attempt was made to do the same. We did not hold these Acts to be unconstitutional, but we simply said that the Acts had to be reviewed in the ordinary way by the Constitutional Court if there were challenges to them; the purported immunization was not acceptable.[29]

This left one major area of contention, and it was the biggest one. I would say more than half of our judgment was devoted to this.[30] Principle XVIII, subsection 2, was one of a cluster of principles dealing

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25. *See* First Certification Judgment, *supra* note 1, ¶¶ 64-68. German jurisprudence is cited by the Court in *id.* ¶ 67 n.53.

26. The relevant language is quoted in *id.* ¶ 63, n.50, and the Court's discussion of this issue appears in *id.* ¶ 69.

27. The clause in question was section 241(1) of the draft constitution. The Court's treatment of this issue appears in First Certification Judgment, *supra* note 1, ¶ 149.

28. Promotion of National Unity and Reconciliation Act 34 of 1995.

29. *See* First Certification Judgment, *supra* note 1, ¶ 150.

30. *See id.* ¶¶ 306-481.

with the devolution of power, the three levels of government, and the importance of the provincial government. This principle said that the new constitutional text should not substantially reduce the powers the provinces had under the Interim Constitution.[31] How do you weigh powers? They are not expressed in pounds or kilograms. You are dealing with clusters of competencies. You are dealing with institutions. You are dealing with the Civil Service. You are dealing with finance. All of these things impact upon powers. We had to examine every aspect of the relationship between provincial government and the national government to see if, at the end of the day, the powers were substantially less than they were in terms of the Interim Constitution.

To make matters more complicated, the new text abolished the Interim Constitution's Senate and replaced it with a National Council of Provinces and developed a whole philosophy of cooperative governance, as opposed to the principles of competitive relationships between levels of government, which had been strongly present in the debate over federalism versus a unitary state in South Africa.[32] How could you compare the National Council of Provinces, which represented the executives of the nine provinces in the central government, with the Senate, which functioned in a completely different way? It is like comparing apples and pears. But we had to. We simply did not know how this new council would function. In light of this uncertainty, we ultimately concluded that although the powers of the provinces had not been diminished by the creation of this Council, we could not declare that provincial powers had been increased either.[33]

Also, to further complicate matters, the provinces had exclusive powers, which could be overridden in special circumstances by the national government. Most powers are concurrent, which means health, education, transport, housing, and things of that kind, belong both to the provinces and to the national government. There are rather complicated arrangements for resolving what happens when you have a clash between the provincial law and the national law. After examining these issues, we came to the conclusion that the provinces' exclusive powers had been somewhat increased, but that their concurrent powers had decreased.[34]

In the end, we divided up all the different aspects and put them into different categories and weighed each category against its corresponding

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31. *See* Interim Constitution, *supra* note 3, Schedule 4, Principle XVIII.2.

32. In the text ultimately approved by the Court, the basic structure of the National Council of Provinces is addressed at S. AFR. CONST. §§ 60-72, and its role in lawmaking covered principally in sections 73-79. The philosophy of co-operative government is embodied in *id.* at Ch. 3 ("Co-operative Government"), §§ 40-41.

33. *See* First Certification Judgment, *supra* note 1, ¶¶ 318-33.

34. *See id.* ¶¶ 334-41.

cluster. We looked at the interim powers, finance, civil service, structures, institutions, impact on the legislative process, and compared them with the actual powers given in the constitution. After examining the powers, competences, finances and institutional arrangements, we came to the conclusion that in all these respects there had been a reduction in provincial powers, but not a substantial reduction. But when we added the fact that in the case of a conflict between provincial and national statutes, there were certain presumptions in favor of national legislation, we felt that the scale was pushed just past the threshold of substantial reduction, and therefore that Principle XVIII, subsection 2, had not been complied with.[35]

All these matters went back to the Constitutional Assembly. The question was: How long would it take them to rewrite the constitution? Some relief was given to the representatives of the Constitutional Assembly sitting in the court that day by virtue of a statement we made on the last page of the judgment to the effect that, basically, the Principles had been complied with. Basically, a democratic constitution respecting fundamental rights in line with the philosophy and spirit of the Principles had been established.[36] However, in nine, specific, identifiable areas, there was non-compliance.[37] The implication was that it was not necessary to go back to the drawing board and rewrite the whole constitution, thereby keeping the whole country in suspense and preventing Parliament from doing its ordinary legislative business. We finally allowed them until the 11th of October, 1996, to get the text back to us if they wanted us certify the Constitution this year. Our last term is the month of November. We wanted, at the very least, to have a couple of weeks to think about our judgment, which we expected to be simpler at the second state, since issues had been defined and narrowed. We established that deadline so that we could give the public at least a month to make their objections, and the matter could be properly rehearsed and canvassed.

So if the date has not been changed, the Court will reassemble on November 18. I do not know if we will need the long row of tables in the front for the Counsel, but I assume that we will have the television cameras again—for the benefit of the smokers. We will then decide

35. *See id.* ¶¶ 471-81.

36. *See id.* ¶ 483.

37. These areas are summarized in *id.* ¶ 482.

whether or not we can certify that the constitution of South Africa finally is constitutional.[38]

38. The Court did meet to consider the revised constitutional text, and this time decided that the amended text did comply with the Constitutional Principles. *See* Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 (Constitutional Court, Case CCT 37/96, Dec. 4, 1996). The new constitution is now in effect.

QUESTION: Americans assume that a degree of continuity, but also a degree of change, exists in the American Constitution, which is now the oldest continuing constitution in the world. I am curious to know whether you presumed that the South African Constitution, by virtue of being more detailed and by virtue of being based on the thirty-four principles, is somehow going to be less susceptible to broad interpretations that alter the Constitution from its original text as it is interpreted in the next generation or two.

JUDGE SACHS: You do not have to tell us about the role interpretation plays. Fairly early on, we had debates, which can be found in the judgments,[1] between what some people call a "literalist" approach—and the way it was presented, the word "literalist" did not sound too good—and the purposive approach. The purposive approach, I think, everybody accepts now. But it is not a purposive approach that allows the judges to say anything they like or to be totally subjective. It is purposive on the basis of the language of the constitution, the structure of the constitution, the spirit and thrust of neighboring clauses within the constitution, and the evils the constitution was designed to overcome, evils that are still of recent, painful memory. All these things are taken into account. It is not simply inventing some kind of judicial philosophy to achieve a certain result.

At the same time, a very important factor in our interpretation is what we are required to do by the Bill of Rights itself and what we are also encouraged to do. We are required to apply international law when it is applicable, and we are encouraged to look at foreign jurisprudence, and we do.[2] We are also required in interpreting our constitution, and this is a specific constitutional command, to promote the values of a society based on freedom and equality.[3] But of course these are very open-ended words, and there is no "Society X" that is the model we simply follow. This is a "notional" concept, one that you distill from looking at a wide range of other sources.

For example, right now we have a case in which we have not given judgment yet, but whose elements are a matter of public record already.[4] The case is about fathers' rights. By legislation, the biological father, not married to the mother, is shut out from adoption proceedings. I have been

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1. *See* S v. Mhlungu, 1995 (3) SA 867 (CC).
2. *See* S. AFR. CONST. §§ 39(1)(b) & (c).
3. *See id.* § 39(1)(a).
4. *See* Fraser v. Children's Court, 1997 Case No. 31/96 (CC).

trying to find my way through the American jurisprudence on the subject, and I am having great difficulty finding any clear, central doctrine. Partly this is because the situation is not clear. The variety of life circumstances make the number of permutations enormous. But, partly it is because what was a majority, led by Justice Brennan, later became a minority, and the former minority became a majority. (I might say, in passing, that what I get from American jurisprudence is great vitality and sometimes wonderful catch phrases. The judgments are not boring, but make good, although sometimes complicated, reading.)

We consult many other sources as well. We often look to Canadian jurisprudence. Their Charter of Rights[5] is a recent document, and its basic structure is similar to ours. We also have a series of rights set out and a broad limitations clause that allows limitations where they are reasonable and justifiable in an open and democratic society based on freedom and equality.[6] We also look a great deal to Indian jurisprudence, which is often very brilliant and rich. We look to Namibia, where the Supreme Court happens to be headed by Justice Ismail Mahomed, who is also the deputy president of our Court. (I sometimes joke that we will not need a regional court of human rights in southern Africa because Justice Ismail Mahomed is on all the courts already.) So this is the framework within which we operate.

I invite you to look at our judgments, though, and reach your own conclusions about whether we are creating a kind of penumbra around our constitution. I will say that I did use the word penumbra once.[7] I did so in connection with section 11, which says every person shall have the right to freedom and security of the person.[8] In many jurisdictions there has been debate over whether freedom and security of the person are two

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5. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms).

6. *See* S. AFR. CONST. § 36(1)1. The Constitution provides that:

> The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including -
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose.

Id.

7. *See* Ferreira v. Levin, 1996 (1) BCLR 1, 158, 360 (CC).

8. *See* Constitution of the Republic of South Africa, 1993 (as amended) § 11 [hereinafter Interim Constitution]. The comparable provision of the final constitution is S. AFR. CONST. § 12.

aspects of one idea, or two separate sources of rights. It might be argued that freedom is quite distinct from security, and that freedom should be used in the United States' sense, as the right to be left alone by government. From this premise you could conclude that any interference with your wishes becomes an infringement of your freedom rights, and would have to be justified in terms of the limitations clause.

I argue that this cannot be so. I argue in that particular case that, in fact, freedom in a modern society requires extensive regulation. For example, if you do not have regulation, you cannot have elections. My freedom to vote is dependent on the existence of election day and on whether the elections are properly policed. There are other examples: if you do not have regulation of the traffic, you cannot drive; if you did not have a regulation for paying the judge's salaries, then we would not be able to sit in the Constitutional Court and uphold the fundamental rights of people.

While I argued against the purely libertarian approach of freedom as an interpretation of section 11, I also said in the context of that case that the freedom guaranteed in that section should not be limited simply to freedom from physical restraints, even though the section goes on to speak about detention without trial, and cruel, degrading, inhuman punishment or treatment—all of which had a corporeal, physical character. The context was the compulsion on directors of failed companies to answer questions posed by liquidators of the company, even if the answers were incriminating. We upheld requiring answers, but the legislation in question went on to say that those answers could subsequently be used at a criminal trial, and we struck that down. We all had different reasons, and we debated whether it was a fair trial right that was being infringed, or a freedom right that was being infringed.

I said that a company director had no "freedom" not to answer questions because when you solicit funds from the public, that is part of public commerce, and you, therefore, have to account for what you do. So the compulsion to appear and to answer questions is a form of regulation that, to my way of thinking, was not a violation of a fundamental right of freedom, but rather it was part of living in modern society. But when you are compelled to answer a question, and the answer can be used as evidence against you at a subsequent trial, then you face what one of your judges called a "trilemma" of being sent to jail for contempt of court as the penalty for refusing to answer, being sent to jail for perjury, or for being sent to jail for telling the truth.[9] (I converted

9. *See* Murphy v. Waterfront Comm'r, 378 U.S. 52, 55 (1964) (stating that the Fifth Amendment privilege against self-incrimination is founded on "our unwillingness to subject those suspected of [a] crime to the cruel trilemma of self-accusation, perjury or contempt . . .").

that into a "quadrilemma," the fourth alternative being to go to the Constitutional Court, but that was for the sake of inventing the word "quadrilemma.") And I actually use the word "penumbra" with respect to areas of compulsion that are sufficiently intensive and powerful to be akin to physical restraint, but not to apply to ordinary regulation that is part and parcel of living in society. I think this distinction might be of some interest to the debate you have had in this country between the communitarians on one hand and the fierce individual rights advocates on the other. We are attempting to find some kind of accommodation between those two camps without using those dreaded labels.

QUESTION: From what you learned from the legal trends surrounding the legalization of the transitional government, do you have any comments about Hong Kong's transition to Chinese rule?

JUDGE SACHS: I happened to be in Hong Kong earlier this year, and I learned not to offer any feeling whatsoever. I merely listened and spoke about our transition in South Africa.

QUESTION: When you were weighing the facts surrounding the two different government levels to see whether the power of one or the other was going to be diminished, what did you look to, given that certain institutions were new and did not exist?

JUDGE SACHS: All I can say about the weighing process is not "follow my lips" but "read our judgment." It was very intricate, and it would be exhausting for me, and tiring for you, if I were to try and tell you how we did it. But I can tell you it was very, very difficult. We spent weeks and weeks just on that: weighing and reweighing, and refining, categorizing, and comparing all the way through.

QUESTION: To what extent did you look to decolonized African countries to gain ideas and experiences for the drafting of the constitution?

JUDGE SACHS: The experiences of decolonized Africa were both positive and negative in terms of drafting our Constitution. In the 1960s, a number of African countries, the majority, achieved political independence, became sovereign states, and became members of the United Nations.[10] Almost invariably, the constitutions were worked out around a table by means of deals between political elites, either at

10. African nations that became United Nations member states during the 1960s include: Algeria, Botswana, Central African Republic, Chad, Kenya, Niger, Nigeria, Rwanda, Senegal, Somalia, Uganda, Zaire, and Zambia.

Lancaster House in London or at some similar site in Paris. These constitutions did not endure because they did not have legitimacy. They were convenient documents for the transition. The Bills of Rights were beautiful but meaningless for the people of the country, because their guarantees had not emerged from the yearnings or the insistence of the people. Many of the rights were easily negated afterwards by arguing that "African culture is different, our traditions are different. We believe in consensus: that is the African way." And, in the African way, African leaders locked up African trade unionists, locked up African opposition, suppressed African independence, variety and thought, enriched themselves, and often sold out to big multinationals, in the name of the African way of doing things.

Our way was genuinely the South African-African way, if you like. The majority of the people insisted on a Bill of Rights and a universal franchise. They wanted no Mickey Mouse constitution, no funny arrangements. They wanted a clean, open constitution that everybody could understand and that complied with internationally accepted standards and principles. That desire came from the African people, from both the prison of Robben Island and the underground in exile. It did not come from the whites. The whites wanted a special constitution with special protections. They wanted all sorts of intricate arrangements that would have paralyzed government and that would have institutionalized, for all time to come, racial divisions in our country. It was the African people in our country, through their political organizations, who insisted on a Bill of Rights.

We had many negative experiences to watch out for, but there were also positive experiences. The most important was Namibia. Namibia got its independence a few years before we got ours. It was like a trial run. They also had the idea of using fundamental principles, laid out in a "white paper" drafted in advance, that would be the foundation of the settlement that led to independence. Namibia also used proportional representation. Moreover, the structure of their constitution is very similar to the structure of ours. The Bill of Rights is also similar, though it has a number of differences that are quite important. Basically, Namibia's constitution has served as a very positive model for us, and it is functioning.

The Zimbabwe constitution, on the other hand, was bulldozed through at Lancaster House. It is long and intricate. The property clause seems to occupy about half of the whole constitutional text.[11] It is not a constitution that you can pick up and read, understand and feel that "this is my document." It looks like a deal, and it was a deal, and that has de-

11. *See* ZIMB. CONST. ch. 3 (The Declaration of Rights) §16 (Protection from deprivation of property).

legitimized it. Ultimately, this fact made it quite easy for those people in Zimbabwe who wanted to revise the constitution so as to overcome rulings of the Zimbabwean Supreme Court, to discount it by claiming that it did not emerge from sovereignty, to protect sovereignty, or to define the way sovereignty ought to express itself. Rather, they said, the document emerged as a kind of peace deal that corresponded to that particular moment, and was now out of date.

QUESTION: I know there was some debate about the immigration principles, and I am curious what there is in the constitution about immigration and whether it was controversial.

JUDGE SACHS: In terms of immigration, the only principle we have is one that permits emigration. There is a right to leave the country, a right to get a passport, and a right to return.[12] I insisted on that, having been stateless for eight years. It went into the constitution very early on, and it is now enshrined as a fundamental right.

The question of immigration is a very distressing one in our country, as it is in one or two other countries I know, and the same arguments, the same problems, and what I feel are the same failures are being tried. I will not go into detail; I am a judge now and I am supposed to hold my tongue. I only speak when I am spoken to. I just leave it at that.

QUESTION: Can you elaborate on the concept of entrenchability as you described it and what might differentiate the transitional constitution of South Africa from the American one? To what extent are the constitutional principles unamendable?

JUDGE SACHS: Section 74(1) of the draft constitution that came before us for evaluation in terms of the constitutional principles, entrenched four features of our constitutional order contained in the draft's section 1. None of these could be amended without the support of at least seventy-five percent of the members of the Constitutional Assembly.[13] Among these entrenched features, the one that might be most unusual is the second one, which said that South Africa shall be a non-racial and non-sexist society.[14] I think South Africa is the only country in the

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12. *See* S. AFR. CONST. §§ 21(2)-(4).

13. For the comparable provision of the final constitution, which adds the requirement that any change in these features be approved by six of the nine provinces in the National Council of Provinces, see *id.* § 74(1), specifying the procedures for amending section 1, which sets out the values on which the present Republic of South Africa is founded.

14. *See id.* § 1(b).

world whose constitution actually outlaws sexism as such, rather than simply calling for equality and affirmative action. I might also mention that ours is the only constitution—national constitution—in the world which not only outlaws unfair discrimination on such familiar grounds as race, color, creed, language, origin, and belief, but also bars unfair discrimination on the basis of disability (this prohibition can be found elsewhere as well) and sexual orientation.[15]

Though the broad values of section 1 were protected by the requirement of a seventy-five percent majority, the provisions of the Bill of Rights could be amended on the strength of a two-thirds majority. We did not lay down what entrenchment meant. All we said was that it required, for the Bill of Rights, something more than just a simple two-thirds majority because that is what was required for amending any aspect of the constitution. And if you entrenched it—if the word "entrenched" was used—that presupposed that amendment must require two-thirds plus something. We did not say what. So maybe sixty-seven percent would not be enough, but we did not say seventy-five percent would be okay, while seventy-one percent would not be okay. Let us see what we get back.

During the course of argument, the issue was raised as to whether there were certain fundamental features of the constitution that could not be amended at all, under any circumstances. The Indian Supreme Court had decided that there were certain features of democracy that could not be changed, even with the requisite majority, because then you would not have a democratic constitution.[16] They distinguished between what they called "amendment" and "abrogation." Amendment means you keep the basic structure, but you alter the relationship between the parts. If you do something that actually undermines the democratic essence, you are not amending the constitution, you are nullifying it. Likewise, the German constitution contains a clause that does not allow amendment in certain basic features.[17] The Namibian Constitution contains a clause that does not allow amendment to the Bill of Rights that diminishes the rights it

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15. *See id.* § 9(3).

16. The Indian jurisprudence is discussed in *Premier of KwaZulu-Natal v. President of the Republic of South Africa*, 1996 (1) SA 769 (CC).

17. *See* GRUNDGESETZ [CONSTITUTION] [GG] art. 79, § 3 (Amendments to Basic Law) (F.R.G.). The German constitution's counterpart to the American Bill of Rights is embodied in ch. 1, Basic Rights, Basic Law of the F.R.G., arts. 1-19. Section 3 of art. 79 states that "amendments to . . . the principles laid down in Articles 1 and 20 shall be prohibited."

contains, though it does permit expansions of rights.[18] (I find that a little bit problematic because extending the rights of some almost inevitably means diminishing the rights of others. It is not as though there is an unlimited sphere of rights, for rights are usually rights against somebody, and it is the balancing out with which the Bill of Rights is really concerned.)

In any event, the Deputy President of the Court, Judge Mahomed, and I had just raised the question in an earlier case as to whether or not there were certain fundamental features that Parliament, even following new legislative process, could not touch.[19] For example, if Parliament by a two-thirds majority vote amended the constitution to extend its own life by twenty years, or if the two-thirds majority in Parliament amended the constitution to expel the other third, would we uphold the constitutionality of these amendments? And, simply by raising the issue, I think we discouraged any hope that amendments of this sort could be effected.

But this is a very difficult area, and I do not want anything I say this afternoon ever to be quoted against me or to be used as indicating my position on these questions. I mean only to say that we are sensitive to the issue. Our explicit authority to decline to certify the constitutional text is, as you know, solely an authority to determine whether the thirty-four constitutional principles have been adhered to. The thirty-four principles, theoretically, vanish once they are incorporated into the new constitution. They are short life principles from that point of view. But it is very unlikely that they will not resurface, as points of reference, at the very least for purposes of interpretation. The argument has been advanced that they are also fundamental features that cannot be altered by the two-thirds majority at a later stage, but I am certainly not anticipating that question.

QUESTION: To what degree has the body of human rights law that has been developed, first by the International Labor Organization and then by the United Nations in their various covenants, played a role in your deliberations? And, connected with that and with your discussion of the "African way," could you comment on the view one hears in some countries—Burma, Malaysia and a few others—that these rights are really western impositions on the communal values of other societies, other histories, and other cultures?

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18. *See* NAMIB. CONST. ch. 3 (Fundamental Human Rights and Freedoms), art. 25 (Enforcement of Fundamental Rights and Freedoms). This article states that any governmental authority "shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid . . . ." *Id.*

19. *See* Western Cape Legislature v. President of S. Afr., 1995 (10) BCLR 1289 (CC).

JUDGE SACHS: The claim is made for what are called Asian values, which are said to be different from western values. Western values are said to focus very much on the individual, while Asian values look to the family, to the community, and to society, and therefore, the argument proceeds, to refer to this individually-based, western-type set of institutions as "fundamental human rights" is simply to impose the world view of one section of the globe on the rest.

What does it really mean when you speak about human rights being "universal?" Professor Yash Ghai, a professor at Hong Kong University, has written extensively, and with great subtlety, on this very question.[20] If the concept of "universality" means that human rights are developed in one part of the world and then exported to the rest of the world, whose people then learn to be civilized and to behave like decent grown-ups, then I would object to that very, very much. And certainly the West's previous contact with Asia and Africa was far from respectful of human rights. Slavery and colonialism were a total denial of the dignity and the personality of the people.

When I understand human rights to be "universal," however, I understand this to mean that these are the principles and statements of aspirations, goals, and fundamental beliefs that correspond to human needs throughout the globe. These are safeguards against forms of oppression and denial of dignity and respect, safeguards that have been developed and articulated by people from Africa, Asia, Latin America, and Europe. It might be that the Universal Declaration of Human Rights[21] was expressed in 1948 when most of Africa and Asia was under colonial domination. But the same can't be said about the International Covenant on Civil and Political Rights[22] or the International Covenant on Economic, Social and Cultural Rights.[23] Third world countries made a major contribution to these covenants: they introduced the whole element of the importance of particular social and economic rights, rights aimed at achieving a true universality that does not isolate human beings as citizens, voters, or economic actors from human beings as mothers, fathers, and children, or

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20. *See, e.g.*, Y.P. GHAI & J.W.B. MCAUSLAN, PUBLIC LAW AND POLITICAL CHANGE IN KENYA; A STUDY OF THE LEGAL FRAMEWORK OF GOVERNMENT (1970); YASH P. GHAI, REFLECTIONS ON LAW AND ECONOMIC INTEGRATION IN EAST AFRICA (1976); YASH P. GHAI, TWO STUDIES ON ETHINIC GROUP RELATIONS IN AFRICA; SENEGAL, THE UNITED REPUBLIC OF TANZANIA (1974).

21. Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3rd Sess., art. 3 (1948).

22. *See* International Covenant on Civil and Political Rights, G.A. Res. 2200 A, U.N. GAOR, 21st Sess. (1966).

23. *See* International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 A, U.N. GAOR, 21st Sess. (1966).

from human beings as producers or people who want so much to live with decency and dignity. There was very active input from the people of these countries, a contribution that reinforced the fundamental rights of the Universal Declaration. Also, the Universal Declaration was a direct repudiation of the imperialist notions of Hitler, Mussolini, and Hirohito. In that sense, it also articulated a freedom-loving quality that, in fact, was used by the peoples of Africa and Asia to gain their independence. This notion was very, very strongly cited and quoted in the run-up to the achievement of independence in those parts of the world.

So I personally am very skeptical about the claims for Asian values, African values, or Western values; that is, I am not continentally associated. No continent has the right to appropriate values, and no continent has the right to hide behind some kind of continental exceptionalism to avoid fulfilling its responsibilities to all its people. When you find Asians locking up other Asians, in terms of Asian values, or suppressing the rights of other Asians to articulate their viewpoints through freedom of speech, or sending Asian trade unionists to jail for fighting for the rights of Asian workers, or closing down newspapers that Asians are editing, it has nothing to do with the West. These are Asians taking action against Asians and simply using this concept of "consensus in a closed society" to justify what they do.

This is not to say that cultural values or social structures and organizations play no part at all in the way you articulate and manifest the universal principles; I think they are very, very vital. And we in South Africa are contributing what we call "ubuntu," which is in our constitution.[24] Ubuntu is the spirit of accepting that a human being is a human being by virtue of living in society and in the community, a recognition which entitles every single person on this earth to be respected. We used this, for example, in the capital punishment case: even the most abominable people are still human beings until the end, and the state has no right to kill anybody.[25] This is something that is emerging out of our culture, our experience, our values, our society, and our traditions and that fits in with, and enriches, the universal values. That is why universal values are universal—because everybody makes the contribution throughout the world to solve their problems.

In particular, we found the Universal Declaration helped free the African people in our country—and, in the long run, philosophically, helped free the white people as well. Africans resorted to these international instruments, which no one could say were an ANC trick or liberation movement device. We simply said that these are universally

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24. *See* Interim Constitution, *supra* note 8, Epilogue ("National Unity and Reconciliation").

25. *See* S v. Makwanyane and Another, 1995 (3) SA 391 (CC).

accepted principles, and so they are strongly enshrined in our constitution. They were the main sources of reference. The exact combinations, the wording, the focus, and the detail, are ours, and the structures and institutions are ours. The broad principles and values are those universally accepted—and not just "universally" in the West.

We are personally interested in India and the way the Indian Supreme Court interprets their constitution. They endure very difficult times with a huge democracy, an enormous population, a number of major religions, and many different languages, yet the basic institutions of democracy have survived and done reasonably well. That has nothing to do with the West. That is an Asian country and an example to us in all sorts of ways. Namibia, I have already mentioned. We do not know enough about the democracies in Central and South America; we would like to know more.

So I will go on to say that we want to take from the international principles, and we want to contribute to them. We have a right to receive and we also have right to give. We are not, as the writer Bloke Modisani once said, "eternal students at the table of good manners." We have earned our right to contribute to international jurisprudence and international discourse.

QUESTION: Following this question of universal rights to some extent, South Africa is one of the few countries I know that has something of a recognition of the environment in its constitution, and I would be interested in how you may see that playing out. I also have two possibly related questions. First, as you pointed out, you are in a society where some people emphasize the private side, and some come from a background where the role of rights and responsibilities both of a community, and to a community, are a major factor. I would be interested in how you dealt with this. Second, I see the United States struggling now, in the context of environmental protection, with the concept of the "commons," and the rights and responsibilities people might have towards it. How did you address that issue?

JUDGE SACHS: In terms of the environment, the clause in the Interim Constitution simply says that every person has the right to a healthy environment.[26] It constitutionalizes environmental protection. I think the new text is fuller than that, but it wasn't controversial. It was not opposed by anybody; everybody claims to be green; and nobody would stand up and say, "We are against environmental protection." Even businesses are falling over backwards to prove how sensitive they are to the environment, and they all have environmental experts. They

26. *See* Interim Constitution, *supra* note 8, § 29. For the comparable provision of the final constitution, see S. AFR. CONST. § 24.

have only just started using the question of "what's more important, jobs, homes, and incomes or the wetlands?" Recently, the ANC government came down very firmly against mining sand dunes in a very beautiful area, St. Lucia, which I think is now being declared one of the world's heritage areas. But they found a kind of compromise, in terms of which the mining companies would have other tracts of land which they could use.

This has not become a jurisprudential question as of yet. I became quite interested in it when I returned to South Africa because I was invited to speak at conferences on the environment. (I am willing to take on anything.) I did a paper entitled, *Do You Have To Be White To Be Green?*[27] The real question was: is environmental protection a kind of an elite, middle-class issue of importance only to those who have beautiful gardens and who can travel to the nature reserves, when the majority of people are living in squalid slums and have been dispossessed of their land? I said "no." The environment question is one that in Africa is certainly close to people's hearts. The African land is where their ancestors were buried, and it is a source of richness, culture, mystical and religious rites. There is great feeling and respect for the land. The greening of the lands, I said, was part of the healing of the land. All the cultures of South Africa have that in common—the sense of respect for the soil, the water, and the sky—and this is something that will help unite us as a nation. And, I must say, there has been a good response to that.

The environmental question is not simply about greening South Africa, it is a question of avoiding pollution, of not using up resources, and, in particular, of greening the squalid slums that surround all our cities and not simply looking after the elephant and the white rhino in the nature reserves. The white rhino became the target of the attack of all those who saw the environmental question as an elitist one. The poor white rhino, facing extinction anyhow, was almost demolished by the more radical people debating the notion which implied that the environment issue was simply about conservation of game reserves in the wilderness.

The question of communal property in fact arises in a totally different way in South Africa. There are vast portions of our land that are communally occupied and utilized in terms of traditional legal concepts of ownership of land. In terms of those concepts, you cannot mortgage the land or sell it to outsiders, and it has to be used for the benefit of the whole community, but you are given guaranteed rights in relation to particular portions. These are immensely overcrowded portions of our land. They cannot sustain the populations living on them, and there is a

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27. *See* ALBIE SACHS, PROTECTING HUMAN RIGHTS IN A NEW SOUTH AFRICA 139-48 (1990) (incorporating *Do You Have To Be White To Be Green?*).

lot of pressure to privatize title, which is being resisted. I do not know how that is going to work out.

We do have quite a lot of common land such as game reserves, beaches, and mountains. It is shocking to me as a South African, even coming from this terrible South Africa, to find beaches privatized in parts of the world, where you have to pay to go onto the beach. That you do not pay to go onto the beaches in South Africa is something we inherited from Britain that is pretty good. It is God's beach, and open to everybody. The area between the high water mark and the low water mark is in the public domain. So we have quite a strong concept of the public domain.

Right now in Cape Town, which is my city, there is an enormous dispute going on over development proposals on Table Mountain, for some of the most beautiful stretches of landscape in the world. It turns out that about forty years ago a private developer acquired vast tracts of this land, and now there are battles going on as to whether or not very posh, luxurious homes can be built there, with wonderful backdrops of the mountain and views of the sea. Thousands of people are turning out to prevent that from happening.

It might become a judicial question, so I will not say anything more than that, and I am sure nothing I've said gives you the faintest idea of what my approach to these matters would be. I must say, actually, we do take our work as judges very, very seriously, and if the law says something, or if the constitution says something, we will follow it even if we wish the constitution had been written in another way. But, to the extent that in articulating certain values you are looking to universal principles and are trying to find something that really lodges in the constitution, in its entirety, as a meaningful document, clearly one's vision and approach does play a certain role.

QUESTION: My question relates to the mandate in your constitution to consider international law as well as law from other countries. To what extent are you finding that lawyers are learned in those other bodies of law? And, to what extent, if any, is there a prospective attempt to ensure that familiarity, either in the licensing process for lawyers or in the law schools? Are courses in international law and foreign law being required, or are students taking them voluntarily?

JUDGE SACHS: I do not know what the law schools are doing. Since I have become a judge, I have ceased to be a teacher. Although I make occasional forays to the law schools, it is usually to try and tell them something about how we work and not to find out about how they work. Inevitably, if lawyers want to understand our judgments, if they want to train their people to do constitutional litigation (which is the exciting, sexy subject these days), they will just have to look at foreign jurisdictions.

We have a number of text books that do that, that rely very heavily on Canadian, and less heavily on United States, German, and Indian jurisprudence. Inevitably, one result of our new constitution will be to insist on this comparative dimension. Certainly, in all the written and oral arguments we get, international instruments play a very big role. They are fed directly into the debate, and are important elements in helping to interpret our constitution.

QUESTION: You spoke about other African countries that the South African Constitutional Court looked at in trying to decide how to set a constitutional pattern. I am also curious as to what ways you think that the South African constitution-making process will be instructive for other African countries in setting up their constitutions, or whether you think that the situation in South Africa is so exceptional, particularly in terms of the development of its economic system and its economic infrastructure, that you do not think that this constitution-making process will be instructive for other countries.

JUDGE SACHS: Other African countries have said that, "the first will be the last and the last will be the first." We are the last African country to gain formal independence—if you exclude Western Sahara, which has a very specific history—and our path to independence was quite different from that of other African countries. We were, technically, formally, an independent country. There was no external, metropolitan power involved in the process of decolonization and the gaining of constitutional rights; we had to do it ourselves. So it is not just the economic infrastructure that is different, but the whole mode of achieving self-determination is quite different. I do not know if our process can be repeated elsewhere.

However, certain elements of our process can be repeated in Northern Ireland and, certainly, elsewhere in Africa. Our effort to seek consensus, which meant trying to understand the position of the other side and not just scoring a victory, but within the framework of broad principles that are agreed to in advance—that can be repeated elsewhere. Also, the public education—the involvement of civil society, as well as the political parties, in the process—can be repeated elsewhere. But whether the exact formulae can be repeated, I do not know. That is for each country to determine. The biggest lesson we learned is we cannot learn any lessons from anybody else; you have got to do it yourself.

QUESTION: In United States constitutional law there is a continuing debate about how an appointed judiciary can be squared with democracy. Could you tell us how the Constitutional Court is composed—for example, whether the judges are elected or appointed, and for what terms? And in

creating constitutional doctrine, has the Court addressed the concerns of this debate?

JUDGE SACHS: Who are we? There are eleven of us.[28] The President of the Court is appointed by the President of the country, after consulting the chief justice, who is the head of the ordinary judiciary. At least four of the other judges must be sitting judges, and another six are chosen by the President, acting in cabinet, from a list of ten referred to him by the Judicial Service Commission, a commission specially set up to nominate the higher judiciary. The Commission makes its nominations after public hearings. In the case of the Constitutional Court judges, the Commission sends forth the nominations and then the President acting in cabinet chooses six out of the ten people the Commission has nominated.

What authority do we have, not having been elected? That's the nature of the constitutional process. In fact, we frequently have to decide which issues belong to the democratic process and which issues do not. We might come up with positions rather different from the positions adopted by democratic, progressive Americans, who generally seem to support an activist Supreme Court against positions adopted, for example, in Colorado, by referendum or in other words by majority rule in your particular circumstances.[29] In South Africa, where the people have won the vote for the first time, and where, we hope, the principles of constitutionalism, democracy, pluralism, and respect for others are part and parcel of the Parliamentary process, we hope that it will not be necessary to intervene unduly and we do not want to second-guess a legislature in respect of that broad range of options and possibilities, which are ordinarily its responsibility.

But we have done so already. We struck down proclamations by Nelson Mandela dealing with local government elections after Parliament had expressly authorized him to issue those proclamations.[30] "A man's got to do what a man's got to do," and we said, "What Parliament's got to do, Parliament's got to do," and it cannot give its powers over to the President. So we will act when it is necessary. The president accepts it with great poise, even almost turns it into a victory by saying, "You see what a marvelous country I am the president of?"

In a strange way, you only get real public acceptance as a court when you strike down acts of the government, and we have done that in two

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28. *See* Interim Constitution, *supra* note 8, §§ 97, 99, 105.

29. *See* Romer v. Evans, 116 S.Ct 1620 (1996).

30. *See* Executive Council, Western Cape Legislature, and Others v. President of the Republic of South Africa and Others, 1995 (4) SA 877 (CC).

major instances. One was capital punishment.[31] The present government supported the elimination of capital punishment, so that was not a courageous decision of ours from that point of view. In terms of the general climate, it was not a popular decision, but it did not mean going against the government. The same can be said of our decisions striking down juvenile corporal punishment,[32] and the system of imprisonment of civil debtors.[33]

The other example is the election proclamation case I have been discussing. The government supported these election proclamations, and our striking them down was hailed with great joy by the National Party in the Western Cape. So be it. It wasn't our concern. The fact that I was a voter in the Western Cape and as a result couldn't vote until three months later, and had belonged to the ANC before—I won't tell you who I voted for when the moment came, because my vote is my secret—really had nothing to do with the decision in the end.

I had to follow my judicial oath to apply the constitution without fear, favor, or prejudice, and I must say that we all do that. We do not feel pressures to go along with any political party, or with the government or against the government. We do have great difficulty in finding the right interpretation of the constitution. We often have dissenting opinions or opinions that concur in the result but for completely different reasons. And I think we have achieved credibility. It is not for me to say, but I am going to say it. I sometimes have this vision that when a husband and wife are fighting, they will say, "I'll take you to the Constitutional Court," as though we are the ultimate authority on correctness, virtue, and morality in the country. We have certainly entered into popular consciousness in that respect.

For me, personally, it is absolutely a thrilling endeavor. It is helping to establish the culture of human rights and laying the foundations of the functioning of the constitution and assuring that there is a safeguard—a body of people working within a framework of basic political morality, very much in a way that Professor Dworkin would feel comfortable with[34]—that is in place to maintain these enduring principles. One feels—I won't say a "privilege," because each one of us has earned the positions that we have. The eleven members of the Court have all participated in the human rights struggle in different ways in South Africa. We have all thought about, and wrestled with, these issues. But it is a

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31. *See* S v. Makwanyane and Another, 1995 (3) SA 391 (CC).

32. *See* S v. Williams and Others, 1995 (3) SA 632 (CC).

33. *See* Coetzee v. Government of the Republic of South Africa; Matiso and Others v. Commanding Officer, Port Elizabeth Prison, and Others, 1995 (4) SA 631 (CC).

34. *See, e.g.*, RONALD DWORKIN, A MATTER OF PRINCIPLE (1985).

great joy to be on the Court. I will not say privilege—my colleagues have earned their positions—but it is a great joy.

And my colleagues are outstanding. The brightness, the interaction, the humanity, the intellectual sharpness, and the willingness to work hard and do research impress me and move me each time. So one feels constantly renewed. There is no cynicism there at all, and I think this is coming through to the public. It is very tough on counsel: it is eleven against one. I would almost say it is a violation of the equality principle, and no advocate has sat down smiling. It is not that we set out to demolish people; it is just very tough. Some of my colleagues are extremely trenchant. And it is not just half an hour; we go on for a couple of hours. Our work is conceptual and deals with basic rights and freedoms, and it also deals with the word, with finding the right language to convey your innermost concept in relation to these fundamental values. So it is something, as you can see, that I am very enthusiastic about.