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THE POLITICS OF ACCOMMODATION:
CONSTITUTION-MAKING IN SOUTH AFRICA ALBIE SACHS

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A Lecture by Albie Sachs

â\200\234Dear Colleagues,

I am a lecturer but I will not be lecturing. I am a Judge but I won't be passing judgement, I was an activist but I won't be speaking as an ex-activist. Today I am speaking as a human being, I am speaking as an African. I am also speaking as a victim of a bomb attack. When this happened I went into almost total darkness and the first words I heard were spoken in Portuguese: â\200\234Albie, you are in Maputo Central Hospital, you must face the future with courageâ\200\235. These words marked my comeback into the world, this was my re-birth. I shed blood on Mozambican soil - I was left without an arm like many thousands and thousands of Angolans and thousands and thousands of Mozambicans, all victims of bombs manufactured in South Africa, in my country. I was a victim of a bomb manufactured in South Africa, my country. It was people like you who saved my life. I am speaking with great emotion and with a conviction that arises not from lectures, not from university, not from the inspiring and important words of the preamble to the American Constitution, but which comes from my experience of life which was a collective experience, the experience of a generation, the experience of countries. Today I speak in the name of that experience.

There are two things of fundamental importance which I would like to relate to you today:

Firstly, it is important to understand why any country should proceed to develop democracy and apply the principles of a Bill of Rights. It should do so not with a view to pleasing others, and certainly not to prove to anyone that it is civilized, but to solve its own problems. This is the only reason that justifies developing democracy and a Bill of Rights. We move forward in that direction because it provides the only way of enabling us to live together in a divided country, to achieve a sustainable degree of social harmony and to create the conditions for equitable development and sharing of the countryâ\200\231s resources. This was our experience in South Africa. I am sure that it must be valid all over the globe.

Democracy and human rights do not in themselves solve our problems, but they give us the framework in which we can solve our problems. The alternative is an endless struggle for domination and mutual ruin. Southern Africa is rich in positive and negative experiences. We do not have to import magic solutions from abroad. We must ally universal experience to our own experience and find our own solutions.

I remember well the day when Professor Oscar Monteiro gave a lecture at the Eduardo Mondlane University commenting on a meeting with friends from Europe who had told him with satisfaction "We have planted good seeds in this country ". Dr. Monteiro conveyed to us his discomfort with that formulation. Democracy, he pointed out, was not a tree that grows in one country or continent and then produces good seeds that are transported to another country where they are then sown, watered and cared for. In his view, Democracy was a large universal tree, a global tree that had many roots, and each

country was a root, each people a root of the same tree. It was the suffering, anxiety, idealism, conflict, courage and intelligence of all peoples that nourished that tree.

That was our experience in South Africa. Not so long ago, the land of apartheid was regarded as the polecat of the world. Now people from Northern Ireland have come to South Africa to try to understand how we managed to put a stop to the differences, the conflicts, the hatred and the deeply institutionalized racism. Now we can tell the whole world with pride: I am a South African. How was it possible to create a new nation out of a country seething with historic hatred? This was referred to as a miracle. Yet our transformation came about not because of a marvellous person such as Nelson Mandela. It was because of the participation of millions of people acting with great calm and intelligence in the midst of severe conflict and mistrust, it was willed, it didnâ\200\231t just happen, we worked and worked and attended thousands of meetings.

(I once thought that freedom implied that there would be no more meetings. Unfortunately we have freedom in South Africa and we have even more meetings. I am sure you know what I am talking about).

The roots of South African struggle and reconciliation have in this way contributed towards the growth of the grand tree of human freedom, producing new flowers and leaves. It was only through accepting democracy and the principles of a Bill of Rights that we were able to create the confidence, the feeling of belonging and of organic patriotism which gave us not only a new flag and anthem, but a sentiment in our hearts of shared loyalty. It was through creating a citizenship of moral equals, an institutionally protected citizenship, that we secured space for each one of us to feel free and safe. This is the first general

idea that I would like to share with you: we develop democracy and human rights to solve our own problems, not to please others.

The second fundamental aspect that I would like to share with you is the importance of the negotiation process itself. In our case, we learnt that the process can be as important as the outcome. It involves the manner in which we relate to each other, the way in which we talk to find solutions to solve the problems of the country. (I prefer the word â\200\230accommodationâ\200\231 to the â\200\230word compromiseâ\200\231. To compromise can mean simply to do a deal without a principled basis. To accommodate means to acknowledge the perspectives and deeply held views of others, but to do so within a framework of inclusivity and respect for basic principle). This was very important to create confidence. The country belonged not to one group or the other, but to all of us. If we listened to each other now during the negotiations, we would listen to each other in a future parliament. If we respected rules of procedure and decision-making now during negotiations, we were likely to do so under the new constitution. Previously the only way we had used to solve our problems had been through pressure and power. Squash the opposition and win. With our intelligence, our courage, our imagination and our dialogue, we managed to create a nation, we managed to create a proud sentiment of being South African.

This does not mean that conflict ends. A democratic country is always in conflict. Conflict is a part of life - but there are different forms of conflict. There is conflict with guns and there is conflict to gain the support of the people, conflict of words, ideas, concepts and expression, which is totally different. The idea is not to create unanimity as concerns all political, social and cultural issues. This is not the point. The idea is to create unanimity about the context in which the debate takes place

over the future of the country, over the use of its resources, over the manner in which the country must be governed. This is done in the spirit of African sister and brotherhood, in a civilized manner, in a democratic manner. This is how negotiators work. Parties carry on, new parties are formed, social concepts continue, differences continue but these differences are not solved by force or the exercise of unbridled political power, but through the power of argument and conscience and the electoral support of the people.

Now I would like to discuss the special role that a Bill of Rights played in our process. The question of basic civil, political and social rights was central to the anti-apartheid struggle, which in this respect was somewhat different from your struggle against colonial domination. For the Angolan people the most important aspect was to gain independence. There was no possibility of

having a meaningful Bill of Rights while under rule from Lisbon.

Even if the people of Portugal itself had enjoyed fundamental rights at the time, the colonial system as such was totally incompatible with freedom, democracy and fundamental rights. Thus, without ending the colonial system one could not think about civil rights and fundamental freedoms. All attention was necessarily focused on gaining independence. And then, as you all know, great differences emerged amongst various groupings in Angola as concerns the nature and the content of independence. The cold war exacted a terrible toll on your soil.

As for us, South Africa had been independent since 1910 when the British ceded control and sovereignty and left the country in the hands of a white minority. Technically, it was an independent country. The purpose of our struggle was not to gain independence and create two states where one had existed

before, but to transform and democratise the existing state entity. We all lived together in one state, oppressor and oppressed, minority and majority. The achievement of democracy was our equivalent of your independence. The whites enjoyed virtually exclusive use of all democratic institutions; elections every 5 years, political parties, freedom of expression, a certain protection through the courts, everything existed for the whites who made up less than twenty percent of the population. But the majority was dominated, colonised. They did not participate in the independence which Britain had granted to the whites. They were treated as if in an internal colony. The way to eradicate internal colonialism was not to create an independent state, but to destroy apartheid, destroy all the laws, rules and psychological practices of the system which oppressed the majority of the population.

There are many countries that are racist but they disguise it. Our racist constitutional order openly gave and took away rights depending on the colour, origin and the language of the person. Our country was divided, the people were fragmented, the institutions separate. Opposition was violently suppressed. And this is where our role came in. Our struggle was to end these divisions among the people. Therefore the fundamental principle was to create a nation, a non-racial country, where everybody mattered. We needed to destroy institutionalized racism and law-enforced dispossession. This was the central issue. And from there we had to create a democracy that would guarantee rights to all. This was the basis of our struggle for national liberation. It was in this context that the idea of a Bill of Rights was born.

I remember the 1980's very well. At that time I was working in the Ministry of Justice in Mozambique as head of the department of research. I was invited by Oliver Tambo, then

President of the ANC, to become a member of the Constitutional Committee of the ANC. I was in particular asked to prepare a paper on a Bill of Rights for a new democratic South Africa. It was very controversial at the time. At the University of Natal a group of young black law students had created a committee that was called the Anti Bill of Rights Committee.

It might seem strange but in South Africa at the time, a Bill of Rights was perceived by the oppressed as something negative, as a document that the whites wanted to entrench before democracy was introduced so as to limit the changes that democracy could bring about.

Someone called it a Bill of Rights. The fear was that the concept of protecting individual rights especially property rights, would be used to retain property in the hands of the white community as a whole. My paper disputed their approach. The Bill of Rights could be like that. It could be a document which in the pursuit of an extreme neo-liberalist philosophy totally blocked any activity of the state to create social justice. The fact was that the whites owned virtually the whole country. Eighty seven percent of South African territory, by law, belonged to the whites. Central business districts and most of trade and industry, mining and farming were in white hands. It was therefore possible to conceive of a Bill of Rights which did not allow for any change, any opening of the economy, any access by the people in general to the wealth of the country. We organised a workshop in Lusaka with ANC soldiers, activists, intellectuals and various other people. We had a serious discussion. At that time we lived in exile, negotiations had not started, but it was necessary to prepare ourselves for the future. I saw the dangers of a purely negative Bill of Rights, but argued that there were three reasons for having a Bill of Rights

in South Africa. The first reason was diplomatic. It would have been only too convenient for the apartheid rulers if we had taken a stand against a Bill of Rights because they could have said â\200\234so you see, the ANC is against freedom, the black masses are going to take power, they are going crush everybody and . destroy everything, and we are the only safeguard against that type of destructionâ\200\235. Yet although it was important for diplomatic and tactical purposes to be viewed in a positive light throughout the world, this was a weak reason in itself.

The second reason was more fundamental. The basic argument was conceived and developed by Oliver Tambo. It was the answer to the apartheid contention that we were of different races in South Africa, with different historical experiences and different futures, we were fighting each other, it was impossible for us all to live together in one country as equal citizens. It was a response to the claim for a protected and special position for whites so, it was said, as to avoid a black majority controlling and dominating everything and taking revenge. In various parts of the world, even amongst our friends, there was concern about the future of the whites. Often they said â\200\234You have to be honest and pragmatic. It is impossible for blacks and whites to live together in South Africa as equals. It is impossibleâ\200\235. Our answer was the Bill of Rights. It would protect everybody not just linguistic or racial groups, but all individuals who were citizens of the same country. To achieve this we had not only to put these principles down on paper as worthy goals, but to create credible institutions to ensure their implementation. This was the strategic reason for proceeding enthusiastically with the idea of a Bill of Rights. The movement seeking radical transformation came to emphatically support a Bill of Rights, not to please others, because it helped solve the problems of achieving peace, transformation and Nation building in out country.

As I indicated, there was a third reason as well. I discussed this one with some nervousness. At the time we were in Lusaka and Kenneth Kaunda had given the ANC great support. I lived in Mozambique as a refugee, a freedom fighter, and 1 was always well treated. But I saw in these countries which I loved things with my own eyes that were not correct. Even in friendly countries, countries which gave us great support, countries which suffered greatly for the cause of freedom in South Africa, unacceptable things were happening. This was not what we were fighting for. 1 must stress that the countries suffered, suffered much, and there is often not enough appreciation of the price that Angola paid, that Mozambique paid, in order that we might achieve freedom in South Africa. (I want to say that I accepted this invitation because personally I owe you very much, as a South African, a citizen, a law professor, a judge, 1 owe you very much, perhaps my life - you are still paying the price for our freedom and we have to acknowledge this). As I said, it was with some hesitation that I presented the third reason for having a Bill or Rights. Please remember that at that time I was an activist and 1 spoke to guerrillas, activists and soldiers of the ANC, who were involved in an armed struggle for freedom. I said that I knew that various revolutionary and national liberation movements existed that had fought with great courage and heroism for a new society. Yet, thereafter the promise of freedom had not always been realised. There is no guarantee that somebody who is a freedom fighter, who is willing to sacrifice his life for freedom, will not violate the rights of others when he takes over power. I said this with certainty, but not without anxiety at the time. It was easy for people to say â\200\234 Albie Sachs is one of those lawyers that thinks in a very abstract way. It was not he who suffered bodily at the hands of racism and oppressionâ\200\235. It required courage for me to speak on the subject. Courage does not always mean to confront the enemy, the torturers, bravely. Sometimes we need

courage to confront our own comrades, our colleagues, our â\200\230maninosâ\200\231, whether this be in the Constitutional Court or in politics or in struggle. What turned out to be interesting was that far from being hostile, everyone in the room showed relief. It was important to hear someone from inside the movement expressing their own doubts about the future. We would fight, fight, fight to create a new country, a new democracy, but what if this resulted in another type of suffering and oppression?

It was as a result of these sorts of debates that we accepted the need for a Bill of Rights which would guarantee the rights of all. Even before we entered negotiations we assumed and accepted the central position that a Bill of Rights would have. We said that this Bill of Rights would not simply give abstract guarantees to the people. It should be a document which encompassed the dignity of all, including the poorest, the most marginalized, and the most dispossessed.

It should be remembered too that this was a time when concepts of peopleâ\200\231s power were strong. The argument was that in order to fight a monolithic racist regime it was necessary to develop another monolithic force, one which would unite the whole population so that a new power would be instituted, this time in favour of the population as a whole. It was assumed that good people who had fought a just struggle would automatically use their power to guarantee the rights of the people. We had to move beyond that notion. We had to ensure that the constitution would allow the most humble people and not only the leaders, but also the unknown people who had participated in our struggle, who had suffered the most to guarantee our freedom, to benefit from the rights guaranteed by the Bill of Rights. But at the same time the Bill of Rights had to respond to the needs of everybody. It implied that the reactionaries, whether former white oppressors or black collaborators with

apartheid, would also have to be seen as members of the nation. There could not be two nations, a poor black nation on the one side, and a wealthy white one on the other. It was necessary to create a nation where everybody would have rights - the good, the bad, the rich, the poor, the whites, the blacks. It was also necessary to bring about changes by democratic means.

We had all to see the need to change from conceptions of â\200\230peopleâ\200\231s powerâ\200\231 to ones of â\200\230peopleâ\200\231s rightsâ\200\231. Peopleâ\200\231s power comes from the top, peopleâ\200\231s rights comes from the bottom. The object was the same. It was to fight for freedom for the poor, and for the dignity of everybody. But the method was different. It implied that the state should play an important role, but not be all important. The people themselves should create their own mechanisms and institutions to meet their needs. The role of the government was to establish the space, the institutions, the mechanisms, to encourage this process. Within the ANC there had never been a firm ideological position on these issues. The idea of whether to have a pluralist country, or a peoples power country, had been left open. But in 1985, 1986, 1987, I was living in Mozambique. I loved Mozambique, I loved Samora Machel. (I have not quoted him in a judgement in my Court yet, but it could happen! A great part of my thoughts on life were formed in Mozambique). 1 also saw negative and incorrect things, there which today my friends in Mozambique acknowledge as such. 1 saw that the people themselves, if they wanted recourse to justice and if somebody had been imprisoned, the only way to deal with the matter was not to go to the court and demand their rights, but to get to know the head of the prison and pay a â\200\230Agazosaâ\200\231 - a bribe, as you say here. (Mozambique uses another word - â\200\230Agorgetaâ\200\231: each country has its own manner of saying â\200\230to pay a bribeâ\200\231, but money is money.) The rich, those who have good contacts, do not need the law because they could operate through power. It

was the poor people, the humble families and the simple families who needed the law. It was a strong and harsh experience for me.

I had supported the revolutionary process. I had been out in the streets, at that time I still had my right hand, and I had shouted â\200\234viva, vivaâ\200\235. If we are to be honest people, scientists, lawyers, comrades, activists, human beings, we must see with our eyes, we must confront reality. This does not mean giving up hope or abandoning fundamental idealism, but it does mean looking at problems and confronting them honestly.

Fortunately, for us it was possible to open our eyes wide before entering into negotiations. It was important not to reject pluralism, but to accept it, not as something negative, but as something that would allow the people to work, to participate, to advance their interests, and not be afraid of democracy. This was the lesson that life had taught the generation that lived in exile at that time. Then, in 1990, Nelson Mandela was released after 27 years in prison. I returned to South Africa after 24 years in exile. Thousands and thousands were released from prison or returned from exile. The negotiation process started in 1990. The final document was only accepted in 1996, after 6 years of extremely hard work, of interruptions, collapses, outbursts, rolling mass action and massacres, without apparently achieving anything.

But we managed to adopt it and we did so on our own. We received great support from abroad and from many foreign organisations, but basically we were alone. We looked into each otherâ\200\231s eyes, friends and enemies sat at the same table. We had to live together in the same country. How could we do this without killing each other? How could we break the cycle of domination? Our history had been one of cycles of domination.

Boer over Black, British over Boer, Boer over British and Black. We did not want yet a new form of domination, even if it included the majority for the first time. We wanted a country for all (â\200\234South Africa belongs to all who live in it, Black and Whiteâ\200\235). We sought a land where all people, whoever they were could feel free, comfortable and at home. How could we start to do normal things, and live for the first time in a normal society? We ached for that.

From the very beginning of negotiations there was a fundamental contradiction between two blocs. One of the blocs I will refer to as the â\200\230regime blocâ\200\231. (The changes in vocabulary were interesting. First it was the â\200\230enemyâ\200\231, then it became the â\200\230regimeâ\200\231, then the â\200\230governmentâ\200\231, then â\200\231the othe r sideâ\200\231 and finally it ended up as the â\200\230oppositionâ\200\231. That is how it happened. Until this day I have great difficulty in not saying the â\200\234Bloody Governmentâ\200\235 - and I do not even know how to say it in Portuguese, somebody please help me: â\200\234Governo de Merdaâ\200\235 - thank you.)

The â\200\230regime blocâ\200\231 included many Bantustan administrations, that is the traditional leaders who worked with the regime. On some issues they were joined by more liberal groups that had been working against apartheid but within the old racist parliament. All the groups demanded that the negotiators themselves draft a new constitution. In their view the very idea of constitutionalism was to put a break on majority power so as to protect the rights of minorities.

The second bloc I will refer to as the â\200\230liberation blocâ\200\231. Their argument was just the opposite. The majority had always been denied the right to self-determination. How could self-proclaimed negotiators draw up a constitution for the country?

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The only constitution that would be legitimate was one that would be drafted by an assembly acting with the mandate of the people as a whole. It was especially important for the black population that had never had the right to vote, to participate in the process of mandating negotiators. So who was right? The â\200\230regime blocâ\200\231 or the â\200\230liberation blocâ\200\231? Who thinks the regime
block was right? Raise your hands! Those who think that the liberation block was right, raise your hands! The answer is: both were right!!

The minorities were right not to want to be totally dominated by the majority and left without a voice of their own; what type of constitution would it be if fifty one percent completely controlled the destiny of the other forty nine percent? Every country has many voices, all have a right to be heard. None should face extinction.

The whole point of a national constitution is that it is based upon the opinions of the whole nation. The concept of inclusivity was fundamental. To this extent the regime block was right. But the liberation bloc was also right. If a group sitting around a table could draw up a constitution, another group at a table could also undo it. There needed to be a fundamental process of constitution-making with a great degree of public participation. The involvement of the nation through elections was not only a technical necessity for democratic legitimacy but a precondition for psychological legitimacy. We needed a large, visible historical process with a manifest mandate form the nation as a whole.

Our solution was to create a two stage constitution-making process. The negotiators would draft an interim constitution to create the conditions for drawing up of a final constitution. These conditions included general elections on the basis of one

person one vote for a new parliament, which would then choose the president and a draft a new constitution on the basis of thirty four principles agreed to in advance and enshrined in the interim constitution. A two-thirds majority was required and parliament was given two years for the drafting. An interim Bill of Rights was agreed to, and a Constitutional Court set up to ensure that fundamental rights were upheld in the meantime, and that the agreed principles were respected in the final constitution. We knew that elections were fundamental in South Africa. Whites had always had elections, blacks had always been excluded. In Angola you asked for independence, in South Africa we demanded one person one vote.

The principle of inclusivity had to be respected. The requirement of a two-thirds majority meant that one party could not write the Constitution on its own. Furthermore, we accepted the principle of elections based on proportional representation. This was to allow all groups to get involved. Everyone should feel: â\200\234This is our Constitution, we helped make itâ\200\235. There was no cut off point, no threshold or minimum percentage required. A party that only won 50 000 votes in a suffrage of 20 million is represented in Parliament. It was important that even small groups felt included in the process.

The agreement on the 34 principles was a major confidence building factor. They included conceptions such as separation of powers, the inclusion of a Bill of Rights based on internationally accepted concepts, and the relationship between different levels of government. Special attention was paid to the

development of concurrent powers for national and provincial governments.

An issue which turned out not to be controversial was how the President should be chosen. We rejected the idea of a directly elected President, and opted instead for a President chosen for a fixed term by parliament. South African experience had made us fearful of a President with too much personal power and autonomy. First we had had a colonial tradition with the Governor at the top making all the decisions. Secondly, Apartheid had distorted traditional leadership, emphasising the authoritarian aspects and crushing the democratic ones. Thirdly, in the liberation struggle itself, a certain degree of central control necessary for the hard clandestine struggle had restricted the scope for democracy and pluralism of views in the liberation movement. The combination of colonialism, traditionalism and centralism could have been fatal. We insisted that Parliament would be the repository of the popular will and that Parliament would then choose a President who would have significant powers which he or she would exercise in co-operation with Parliament. Each country has its own system. This was the system we adopted in South Africa.

We also accepted the concept of a â\200\230Government of National Unityâ\200\231 (GNU) for a period of five years. This government would operate according to a prescribed proportional form of representation both at national and provincial levels. In this way after the first election was held, Nelson Mandela was elected as President, Thabo Mbeki as first Deputy President, and F W de Klerk as second Deputy President. The GNU was important for the initial period but after some years Mr de Klerkâ\200\231s party decided to withdraw and work in opposition. After the next elections the GNU â\200\230sunset clauseâ\200\231 falls away. Coalition government will be voluntary, not obligatory.

[think I can fairly say that our parliamentary institutions are well entrenched and have become an accepted part of national life. Another feature of our situation is that President Mandela has been progressively handing over his functions to Deputy President Thabo Mbeki so as to diminish any problems that might arise from a change in leadership. President Mandela insists that he is only a decoration and that Thabo Mbeki has already become the effective leader of government and head of state! As you know, President Mandela is enormously popular and people will be sad to see him leave the stage. At the same time, there is general admiration for the graceful and voluntary manner in which he is preparing for Thabo Mbeki to take over when he steps down next year.

The issue which proved to be most contested was that of federalism versus the unitary state. I argued strongly against using these labels. You donâ\200\231t start with a preference for one abstract concept or the other, and then force your constitution into it. On the contrary, you start with the problems and needs of the country, work out appropriate arrangements for the exercise of power, and then put the label on afterwards. All modern countries in fact have elements of centralisation and elements of devolution. It is always a matter of degree. We were strongly influenced by a visit to Germany where we encountered the concept of concurrent powers (in Portuguese the word â\200\230concurrentâ\200\231 means competitive and mutually exclusive; in English it is just the opposite, it means operating simultaneously).

Some powers clearly belong to a national government – foreign affairs, defence, protecting the national currency. But may powers have both a national and a regional dimension. National policies have to be developed and national resources made available for health, education and economic development. At

the same time regional factors have to be taken into account in applying the policies and using the resources. Malaria is a problem in the north east of the country. It is not found at all in Cape Town. Yet national standards have to apply for the qualifications of doctors and nurses. We opted for the principle of cooperative governance. The visit paid to Germany proved to be instructive in this respect. (Although it was called the Federal Republic of Germany, it was really far more unitary that the United States of America!). Parliament laboured for two years to draft a new Constitution. The final text was agreed upon on the night of the last day - luckily 1996 was a leap year, so we had one extra day! There was extensive public participation, something like four million written comments were received - some as a result of signatures to petitions based on political mobilisation, some representing the views of concerned individuals. There were regular radio and television programmes on the process. Parliamentary debates were televised so that faces could be seen and arguments heard. A law professor friend of mine had a weekly television programme called â\200\234Future Imperfectâ\200\235. The idea was to put a hypothetical situation to a panel of guests so as to arouse argument on controversial questions - federalism, capital punishment, trade union activity, abortion, socio-economic rights. The themes were serious but the treatment was relaxed. You scored if you spoke with humour and compassion, not if you engaged in party political propaganda. The program did a lot to defuse tensions while educating the public in an entertaining way on basic ideas.

Eventually the text of the final constitution was accepted, with a majority of near ninety percent, some abstentions and almost no votes against. It included provision for a flag, the adoption of a national anthem and national symbols, the approach being always to be as inclusive and accommodating as possible â\200\224 our

flag has six colours, but it works. We have many grave problems in our country, but one feature of which virtually the whole nation is proud is our constitution. As I have said Constitutions donâ\200\231t solve problems but they give us the framework within which we can solve our problems. 1 hope that our experience in South Africa of doing the near impossible gives you courage in your great endeavours to bring peace, stability social progress and happiness to Angola.

In my next presentation I will deal specifically with the Bill of Rights and the role of the Constitutional Court.

In the meanwhile I thank you for the chance to share some of our experiences with you.â\200\235

THE IMPORTANCE OF THE BILL OF RIGHTS IN A FUTURE ANGOLAN CONSTITUTION

Paper presented by Dr. Rui Ferreira
(Law Professor and Lawyer)

â\200\234Chair, Professor Albie Sachs, Delegates:

I would like to apologise in advance if I exceed the 10 minutes which were allocated to me to present my paper. I am going to cut back considerably on the references I had prepared for you.

The invitation I received explained that I should present a brief ˜ paper on the constitutional revision process in Angola and the reforms or changes that the future Bill of Rights may have on the former.

Firstly, I would like to start by offering this initial explanation:

Angola is not in the process of a constitutional revision at the moment. What we intend to do is a constituent process. In other words, we are not going to revise the current constitution. We are going to approve a. new constitution, an ex-novo constitution.

The present National Assembly, which was elected within the framework of the constituent and legislative elections in 1992, received a clear constituent mandate. Resulting from these elections and as stipulated in the present Constitution, the National Assembly received a clear mandate to elaborate and approve the new constitution of Angola. This constituent mandate is a political compromise as agreed upon between the

main political parties that participated in the constitutional revision which provided us with our current Constitution, the Constitution of 1992, and the main infra-constitutional legislation on the Fundamental Rights and the political parties.

I would like to add a second observation to the above-mentioned one. This process began approximately 6 years too late.

According to what was foreseen and agreed, the preparation of the future constitution should have followed the establishment of the present National Assembly.

I will not dwell on the reasons for this delay. We are all quite familiar with them.

I have decided to mention this delay because it means more than just a loss of some time. It signifies, above all, a delay or an interruption in the transitional constitutional process that was begun in 1991.

With these few remarks, I would like to talk about the subject at hand.

It is my personal opinion, that the present Constitution of Angola, I am referring to the Constitution of September 1992, has a genuine Bill of Rights as observed in its second title and throughout the articles set out under the first title. We, Angolans, also have a Bill of Rights.

It can be considered as a modern and mature Bill of Rights. A Bill of Rights which on the formal constitutional statements is on par with the most modern constitutions which are used as references today on this subject.

In our Bill of Rights, we have unequivocally recognised and enshrined the so-called first generation rights, namely, civil and political rights, social, cultural, economic rights or so-called â\200\234second generation rights, which broadly speaking, is what constitutes today the universal judicial conscience in terms of fundamental rights and individual freedoms.

As an example, I would like to refer to the right to life, the abolition of the death penalty, abolition of torture and inhuman treatment, the right to strike, the right to equality of all before the law, the right to human dignity, freedom of the press, freedom of association, assembly and demonstration, the submission of the state to the constitution and the law, the right of legal action against all acts against the rights and legally protected interests, and please note, that I would like to stress this point, it is the constitution itself that incorporates the Universal Declaration of Man of 1948, the African Bill of Rights of Man and of People of 1986, and the International Pacts of Civil, Political, Economic, Social and Cultural Rights of 1976.

I think that this is enough. To a certain extent this may signify all that we desire for our country.

It is my belief that the constituent process that is approached, in terms of the Bill of Rights, will bring about positive changes.

With this I mean that, in my opinion, it is still necessary to go a little further, that is, to develop, enrich, perfect the content and the meaning of the set of rights and freedoms that are included in our Bill of Rights.

We need to find, above all, mechanisms and indispensable guarantees to make the fundamental rights and constitutional freedoms effective, real and guaranteed.

There is a sound framework and favourable internal and external political conditions for the basis of our future Bill of Rights.

Today, undoubtedly, human rights and individual freedoms are constant and â\200\234compulsoryâ\200\235 references in the debates of the governing political class and the opposition. Many, I believe, will surely lay claim to and take credit for the enrichment of our constitution on this matter. [think that political competition will be good for our future constitution and will strengthen our Bill of Rights.

I do, however, feel that there are many challenges that exist on this matter. There are difficult struggles to be won.

I will list a few of these issues that are, in my opinion, the main challenges that we need to overcome in the short-term.

And when 1 say â\200\234weâ\200\235, I am speaking of all Angolans; professionals, politicians, governors, governed, administrators and administrated. I am referring to all of us because a society should have the right and the duty to participate in this process.

The first challenge to be overcome today, has been so ably presented by our distinguished guest, Professor Albie Sachs. This challenge is, in my opinion, the key to the success of the democratic constitutional transition process in South Africa.

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CONSTITUTION-MAKING IN SOUTH AFRICA ALBIE SACHS

In South Africa, they did not theorise new things, they did not discover new things. The success of the transition process in South Africa is not a secret, nor does it contain anything we do not already know.

The process in South Africa was a success because the spirit of reconciliation and the prevalence of the national interest above party interests found practical sense and expression.

In general, I feel that this is the biggest challenge that we face on the issue of preparing for a future Angolan Constitution.

We should give priority to national interests, regardless of political colours or party politics.

We need to act with a reconciliatory spirit, but, please note, without mental reservations. [stress, without mental reservations.

We need to create the predisposition and the political will to make compromises. Not only a declared will, because that already exists and it is not enough, but a political will put into practice, to make political compromises in terms of the future constitution.

Surely everyone will understand my point of view, if we start from the fact that, by constitutional imperative, no single Angolan political party has the legitimacy to approve the future constitution.

The constitutional requirement of a 2/3 majority for the approval of the future constitution is a guarantee for the promotion of constitutional transition in Angola based on consensus.

The way I see it, this guarantee is more than an expression of the â\200\234constitutional rigidityâ\200\235, in the words of the constitutionalists. ˜˜ This guarantee may help to promote consensus in Angola, and above all, it is, perhaps, a guarantee of a constitutional transaction based on negotiations and consensus.

The second main challenge will be to resist the emotional or popular pressure that is expected from some sectors, in respect to the reintroduction of the death sentence in the Angolan legal order.

If the legislators of the future constitution are not ready to resist such pressure, then they will render a poor service to the Nation and go back on the constitutional understanding on the material and the implications of the acknowledgement of the right to life.

The third major challenge is to use this constituent opportunity to develop and to strengthen the gaps that exist in our Bill of Rights, namely, a framework of constitutional guarantees essential for the effectiveness of the rights and liberties that the constitution bestows on the citizens.

With your indulgence, I would like to mention three constitutional elements of this framework of guarantees:

1. The existence of a strong, credible, dignified, independent, moral, swift, efficient and respected judiciary;

Although there are numerous positive signs that we are heading in this direction, we have to be realistic and admit that our Courts and judicial system in general, still needs to achieve a stage of maturity that is indispensable to the de Jactum statement of the state of democratic rights.

2. The submission of the State and the Governors to the Constitution and the Law;

3. The jurisdictional control of the constitutionality and the legality of the action of all the bodies and servants of the State;

To conclude my presentation, I would like to borrow the words of Dr. Bornito de Sousa and thank the Professor for his clear-sightedness, the frank manner in which he related his experience and the knowledge he has and, above all, for his help in making us understand the South African experience, the positive elements, although we still have much to learn from it.

I would also like to congratulate NDI for their initiative in holding this workshop, given the importance of the theme and the contribution that it will make to this general objective; that is, education on democracy and the realization of the most difficult of all the reforms, be these political, constitutional, social, economic, and cultural; to reform our mentalities and our attitudes.

It seems that this workshop has managed to add another building block to our work, which is, after all, the development of a proper attitude to the values and principles that we have declared, particularly, our attitude to build democracy and the rule of law in Angola.

I would like to acknowledge the contribution NDI has made in educating the Angolan political class on democracy and for the reforms made in the conscience, mentalities and attitudes. This will certainly add to the declaration of the values of human dignity, the rule of law, democracy, tolerance and peaceful co-existence in Angola.

(Answers to the questions raised by the delegates)

1. How do you, Dr. Rui Ferreira, evaluate the experience of the Truth and Reconciliation Commission of South Africa? Could that experience be useful for Angola?

As a reply, I would like to suggest that Professor Sachs make a short comment on the request for clarification that was made by the first presenter on the subject of admitting to mistakes and asking for forgiveness subject to conditions, letâ\200\231s say, for the sake of reconciliation, which is a specific aspect of the South African experience.

(After the insistence of the delegates)

The issue of the Truth and Reconciliation Commission, or the experience of the Truth and Reconciliation Commission in South Africa, is a very sensitive and complex issue from a political point of view. For this reason, I will deliberately not express my personal point of view, since this is not a technical-judicial issue, but a political issue. It is a very delicate political issue, in the current Angolan context. For this reason, I would prefer not to express myself publicly at this moment on the matter. I have not thought sufficiently enough on the matter, I donâ\200\231t have a fixed opinion on the issue on whether it would be good or bad for Angola. And since it is better to be safe than sorry, I would prefer not to express my opinion.

2. The economic and social rights are still not respected in Angola. How do you, Dr. Ferreira, think that this problem may be resolved on the constitutional guarantees in the future constitution?

The question which is raised deals with the need to establish constitutionalities for access to and guarantee of the realization of the fundamental social, economic and cultural rights.

We should bear in mind the following:

There are fundamental rights and freedoms stipulated in the constitution that are directly applicable. This means that they confer on the holder this right, the legal power to demand the compliance of this right on anyone who is bound by the corresponding right.

But there are rights, especially of a social and economic nature that, quite simply, are expressed in practice in the form of imposing a right of action for the state.

For example, when we say that â\200\234the citizens have the right to workâ\200\235, an unemployed person may not go to court and demand that the state be prosecuted because he is unemployed; this means that, these are so-called programmatic norms, that impose on the state the right to program and foresee actions that may help to realise this right. Therefore, the role of the state is precisely that, for this type of right, it has to create the channels through which the concrete programmes, managed interventions will be well planned.

Therefore, this was the first explanation on the access. And normally, the constitutions establish this promotional role of the state in terms of the effectiveness of these economic, social, and cultural rights.

3. Why does our current constitution prohibit constitutional referendums?

I believe that the legislator of this constitution preferred to opt for this thesis. There is much controversy on the question of where the constitution or a constitutional matter should or should not be put to a referendum, that is, if it should be decided by means of direct popular consultation - by means of a referendum.

There are many theorists that argue that constitutional matters should not be decided by referendum, that these cannot be decided â\200\234hotly and in the streetâ\200\235. They quote historic examples of constitutional referendums and the bad experience in France during the period of General De Gaulle, that led, lets say, to constitutional referendums, in the perspective of De Gaulle, referendums that were seen as true constitutional coups.

Therefore, the fear is this: the issue put to the referendum, many times populist and without the necessary reflection, may subvert the instituted constitutional order.

Based on this fear, there are many people who today still fear constitutional referendums. It is preferable that the holder of the original constituent power, who are the citizens, the people, elect the person who will exercise the power, which are the constituent assemblies, as is the case of the present National Assembly.

The reason is, therefore, this one. Whether our constitutional legislator was right or wrong, it is not up to me to reply to that. I would like to limit myself to exposing the motives that seem to have been the argument.

4. How does the present Constitutional Law defend itself?

The Constitutional Law has, foreseen mechanisms for its defence. There are various mechanisms, especially in terms on fundamental rights, such as the constitution itself. For example, the institutional provision of a Public Protector, a Constitutional Court, provision for the judicial control of the legality of the action of the state, constitutionality of the action of the state, etc.

I could list a thousand and one examples. But the most relevant one, and I stressed it in my paper, not that this constitution has omitted it, is the provision of the means to guarantee the rights and the defence of the proper constitution.

However, all these foreseen mechanisms have not been put into practice. But, furthermore, this provision seems to have some marked deficiencies. And as I have said before, we can introduce more merit and benefits now, to the framework of the constituent process that is being realized. That is all I have to say on my part.

Once again allow me to express my deepest appreciation for the help we have received here from your presence and your undisputed experience and competenceâ\200\235.

APPENDIX

SCHEDULE 4 OF THE CONSTITUTION
OF SOUTH AFRICA

CONSTITUTIONAL PRINCIPLES

[Schedule 4 amended by s. 13 of Act 2 of 1994 and by s. 2 of Act 3 of 1994.]

I

The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.

II

Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justifiable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution.

I11

The Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity.

IV

The Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels of government.

Vv

The legal system shall ensure the equality of all before the law and an cquitable legal process. Equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.

VI

There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

VII
The judiciary shall be appropriately qualified, independent and

impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights.

VIII

There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common votersâ\200\231 roll, and, in general, proportional representation.

IX

Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government.

X

Formal legislative procedures shall be adhered to by legislative organs at all levels of government.

XI

The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged.

XII

Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free association, be recognised and protected.

XIII

1. The institution, status and role of traditional leadership, according to indigenous law, shall be recognised and protected in the Constitution. Indigenous law, like common law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.

2. Provisions in a provincial constitution relating to the institution, role, authority and status of a traditional monarch shall be recognised and protected in the Constitution .

[Constitutional Principle XIII substituted by s. 2 of Act 3 of 1994.]

XIV

Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy.

XV

Amendments to the Constitution shall require special procedures involving special majorities.

XVI

Government shall be structured at national, provincial and local levels.

XVII
At each level of government there shall be democratic

representation. This principle shall not derogate from the provisions of Principle XIII.

1.

3

4.

XVII

The powers and functions of the national government and provincial governments and the boundaries of the provinces shall be defined in the Constitution.

The powers and functions of the provinces defined in the Constitution, including the competence of a provincial legislature to adopt a constitution for its province, shall not be substantially less than or substantially inferior to those provided for in this Constitution.

The boundaries of the provinces shall be the same as those established in terms of this Constitution.

Amendments to the Constitution which alter the powers, boundaries, functions or institutions of provinces shall in addition to any other procedures specified in the Constitution for constitutional amendments, require the approval of a special majority of the legislatures of the provinces, alternatively, if there is such a chamber, a two-thirds majority of a chamber of Parliament composed of provincial representatives, and if the amendment concerns specific provinces only, the approval of the legislatures of such provinces will also be needed.

5. Provision shall be made for obtaining the views of a provincial legislature concerning all constitutional amendments regarding its powers, boundaries and functions.

[Constitutional Principle XVIII substituted by s. 13 (a) of Act 2 of 1994.]

XIX

The powers and functions at the national and provincial levels of government shall include exclusive and concurrent powers as well as the power to perform functions for other levels of government on an agency or delegation basis.

XX

Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The allocation of powers between different levels of government shall be made on a basis which is conducive to financial viability at each level of government and to effective public administration, and which recognises the need for and promotes national unity and legitimate provincial autonomy and acknowledges cultural

diversity.

XXI

The following criteria shall be applied in the allocation of

powers to the national government and the provincial governments:

1. The level at which decisions can be taken most effectively in respect of the quality and rendering of services, shall be the level responsible and accountable for the quality and the rendering of the services, and such level shall accordingly be empowered by the Constitution to do so.

2. Where it is necessary for the maintenance of essential national standards, for the establishment of minimum standards required for the rendering of services, the maintenance of economic unity, the maintenance of national security or the.prevention of unreasonable action taken by one province which is prejudicial to the interests of another province or the country as a whole, the Constitution shall empower the national government to intervene through legislation or such other steps as may be defined in the Constitution.

3. Where there is necessity for South Africa to speak with one voice, or to act as a single entity- in particular in relation to other states- powers should be allocated to the national government.

4. Where uniformity across the nation is required for a particular function, the legislative power over that function should be allocated predominantly, if not wholly, to the national government.

5. The determination of national economic policies, and the power to promote inter-provincial commerce and to protect the common market in respect of the mobility of goods, services, capital and labour, should be allocate to the national government.

6. Provincial governments shall have powers, either exclusively or concurrently with the national government, inter alia: -

a. for the purposes of provincial planning and development and the rendering of services; and

b. in respect of aspects of government dealing with specific socio-economic and cultural needs and the general well-being of the inhabitants of the province.

7. Where mutual co-operation is essential or desirable or where it is required to guarantee equality of opportunity or access to a government service, the powers should be allocated concurrently to the national government and the provincial governments.

8. The Constitution shall specify how powers which are not specifically allocated in the Constitution to the national government or to a provincial government, shall be dealt with as necessary ancillary powers pertaining to the powers and functions allocated either to the national government or provincial governments.

XXII

The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the

geographical, functional or institutional integrity of the provinces.

XXIII

In the event of a dispute concerning the legislative powers allocated by the Constitution concurrently to the national government and provincial governments which cannot be resolved by a court on a construction of the Constitution, precedence shall be given to the legislative powers of the national government.

XXIV

A framework for local government powers, functions and structures shall be set out in the Constitution. The comprehensive powers, functions and other features of local government shall be set out in parliamentary statutes or in provincial legislation or in both.

XXV

The national government and provincial governments shall have fiscal powers and functions which will be defined in the Constitution. The framework for local government referred to in Principle XXIV shall make provision for appropriate fiscal powers and functions for different categories of local government.

XXVI
Each level of government shall have a constitutional right to an equitable share of revenue collected nationally so as to ensure

that provinces and local governments are able to provide basic services and execute the functions allocated to them.

XXVII

A Financial and Fiscal Commission, in which each province shall be represented, shall recommend equitable fiscal and financial allocations to the provincial and local governments from revenue collected nationally, after taking into account the national interest, economic disparities between the provinces as well as the population and developmental needs, administrative responsibilities and other legitimate interests of each of the provinces.

XXVIII

Notwithstanding the provisions of Principle XII, the right of employers and employees to join and form employer organisations and trade unions and to engage in collective bargaining shall be recognised and protected. Provision shall be made that every person shall have the right to fair labour practices.

XXIX

The independence and impartiality of a Public Service Commission, a Reserve Bank, an Auditor-General and a Public Protector shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service.

XXX

1. There shall be an efficient, non-partisan, career-orientated public service broadly representative of the South African community, functioning on a basis of fairness and which

shall serve all members or the public in an unbiased and impartial manner, and shall, in the exercise of its powers and in compliance with its duties, loyally execute the lawful policies of the government of the day in the performance of its administrative functions. The structures and functioning of the public service, as well as the terms and conditions of service of its members, shall be regulated by law.

2. Every member of the public service shall be entitled to a fair pension.

XXX1

Every member of the security forces (police, military and intelligence), and the security forces as a whole, shall be required to perform their functions and exercise their powers in the national interest and shall be prohibited from furthering or prejudicing party political interest.

XXXII

The Constitution shall provide that until 30 April 1999 the national executive shall be composed and shall function

substantially in the manner provided for in Chapter 6 of this Constitution.

XXXIII
The Constitution shall provide that, unless Parliament is

dissolved on account of its passing a vote of no-confidence in

the Cabinet, no national election shall be held before 30 April 1999,

XXXIV

This Schedule and the recognition therein of the right of the South African people as a whole to self-determination, shall not be construed as precluding, within the framework of the said right, constitutional provision for a notion of the right to self-determination by any community sharing a common cultural and language heritage, whether in a territorial entity within the Republic or in any other recognised way.

The Constitution may give expression to any particular form of self-determination provided there is substantial proven support within the community concerned for such a form of self-determination.

If a territorial entity referred to in paragraph 1 is established in terms of this Constitution before the new constitutional text is adopted, the new Constitution shall entrench the continuation of such territorial entity, including its structures, powers and functions.

[Constitutional Principle XXXIV added by s. 13 (b) of Act 2 of 1994.]