

Following is an edited version of
remarks made by Judge Sachs in response to
questions and comments from the audience:

The court has really become a major institution in South Africa. I found myself saying to someone the other day, "And I told Queen Beatrix of the Netherlands, something or another . . ." It just slipped out, I was dropping a name not for the sake of showing off that we mix with royalty all the time;²⁶ I could as easily have said, "And I was saying to Mary Robinson, the President of

²⁶ It just so happens that, in addition to being in charge of logistics, I am responsible for cuisine in the court; I had to organize a finger lunch, and Queen Beatrix and I were standing next to each other.

Ireland . . . ," or, "As my colleague said to Gro Brundtland, the Prime Minister of Norway last year" We get visited by a number of dignitaries coming to South Africa, wanting to know about the new constitutional order. And they tend to be particularly interested in the Constitutional Court because it is something novel, certainly in our part of the world. I think we are achieving the reputation of being very serious about our work, of not being influenced by any former party political allegiances that we might have had, however intensive. It is seen that we do our work soberly and honestly, but with a lot of feeling for what is happening in the country,

and with concern for not repeating the terrible crimes and injustices of the past.

Certainly Parliament has to listen to us, because we have the power to strike down their legislation. If they are drafting new laws they will always wonder what the Constitutional Court would say. I often feel the most important impact that we have is not on the laws that we strike down, it is on the laws that just do not reach us -- the new legislation that is drafted in such a way as to anticipate what the Constitutional Court might say. The same would apply to police action and executive action. People are all the time thinking, "What would the Constitutional Court say?" In other words,

"What does the constitution have to say on the matter?" Then these are part and parcel of the emergence of a constitutional state, a state based on constitutionalism and respect for fundamental rights.

We have a generation of judges that emerged from the bitter battle against apartheid and injustice and denial of human rights in our country. We are all highly sensitized to these questions. We all in different ways took different options to struggle for human rights in the dark days of the past. So from that point of view, we have an intense commitment to the values contained in the new draft constitution. And it comes out in our judgments -- some people

criticize our judgments for not reflecting, if you like, the diversity of opinions that would include the opinions of the people who defended apartheid in the past. Well, we were chosen according to certain criteria by the judicial service commission, from a balanced group of nominees, half professional and half political, representing the various parties and groupings and so on. Those whom they chose were people who had all rejected apartheid in the past, and who were not willing to compromise on that, or to say for the sake of pluralism that we have to have extreme or radically conservative positions represented on our court.

Establishing the new jurisprudence is

not easy: How you articulate your judgments, the legal styles you use, the kind of discourse that emerges -- and we have not had training for that, or any kind of real preparation. We are learning on the job as we write and respond. Six of our members had been judges before, some only very recently appointed. So they had had some experience. Five of us had never written a judgment before.

The first judgment that Arthur Chaskalson, president of our court, wrote was on capital punishment. It runs to 130 pages. It quoted from the jurisprudence of eleven different countries and international bodies. It has been described as erudite and balanced

and powerful. It was the first judgment he ever wrote. And if you look at it, you would certainly never say that it was someone's first judgement. It has got a solidity and a balance, whether you agree with the conclusion or not, that I think everybody has to admire.

The rest of us concurred in that judgment -- it was a unanimous decision outlawing capital punishment on the basis of our constitutional text -- but we all gave different reasons. It is one of those profound issues that reaches deep inside people, and we forcefully and unanimously held that the law permitting capital punishment in our country was inconsistent

with the prohibitions on cruel and unusual punishment, degrading treatment, and the right to life; it could not be saved by a general limitations clause that we have in our constitution. (All our fundamental rights were qualified by permitting limitations that would be reasonable, justifiable and in some cases necessary in open democratic societies.)

The argument was made that you can execute people -- that taking their lives would be a reasonable limitation on the general right to life because it would protect the lives of other innocent people. We said there was just no proof that capital punishment had that deterrent effect, but

that it was manifestly a cruel and inhuman punishment because it was not established that, by executing some people, you deter other people from taking life. I said that it was manifestly against the right to life, and that the right to life was not the kind of right that was subject to balancing and proportionality. You are either alive or dead, and you cannot have degrees of death where balancing could come in. And so that was the particular ground that I advanced.

So, I see the court as having a strong future in South Africa. I think it has been established as an important instrument in our public life. We are now planning to build our own court -- have our own court building

-- and we are planning to have a competition.

Almost certainly, we will have a very wonderful site right next to the old Fort Prison, which was on the highest ridge in Johannesburg. The prison has been abandoned for a long time. It is the only prison in which the British were incarcerated at one stage. The British in South Africa locked everybody else up. But only once were they locked up, and that was by Paul Kruger's government in the 1890's, when there was an unsuccessful rebellion by the millionaires and so on who had owned the gold mines. They were locked up in the Fort.

Afterwards, Boer rebels in the Cape during the Anglo-Boer War were executed

there. Later again, M.K. Ghandi was detained in the Fort. And Boer rebels in the 1914-1918 War, at least one was detained there, General [NAME]. In 1922 the leaders of the white mineworkers strike, some of whom were executed singing "The Red Flag" as they went to the gallows, were detained there. During the Second World War some of the pro-Nazi resistance were held there. And in the 1950's, Nelson Mandela and all the people put on trial for treason were detained in the Fort. So it has extraordinary -- intense -- memories, and the idea is to convert the old Fort into a living museum of national memory, remembrance, and reconciliation.

At its side is what was called the

"Women's Section," which could become a museum recording the struggle of women in South Africa for emancipation and against apartheid, for full equality for everybody. In front will be the Constitutional Court and then lower down on the hill, one day, the building of the Public Protector, Commission for Human Rights, Commission for General Equality, maybe the Land Claims Commission as well. We hope to create a sort of constitutional hill, with gardens for the public, the library open to the public, and a Court that is very accessible, with premises that can be used for art shows and recitals, and rather elite but nevertheless public activities, when the court is not in session.

So I do envisage a very active role for the court in the future.

Our jurisprudence is put on the internet within an hour.²⁷ The cases can be downloaded wherever you are in the world. They are now being referred to by the European Court of Human Rights, for example.

I do not think it is the practice of your Supreme Court to follow foreign jurisprudence. We are not required by our constitution to follow foreign jurisprudence, but we are invited to do so. We find it extremely rewarding in testing the reasonableness and justifiability of limitations on rights and so on -- to see

²⁷ JILP: INSERT CITE TO WEBSITE HERE>

what is done in the United States, in Canada, in Germany, in Namibia, in India. Indian jurisprudence is extremely rich. They have a very strong supreme court there and we find their judgments very, very valuable. Canada, with their charter of rights being very recent, and to some extent being the model for our Bill of Rights, is also a particularly valuable source for us. Germany I have already mentioned. The German constitutional court helps a lot. And we love reading the U.S. Supreme Court reports, but we cannot always work out exactly what the rationale is, and what the doctrine is, over a period of time. But certainly we pick up some wonderful phrases and very

intelligent concepts, and reasoning that is very valuable for us!

In terms of amendments, there is no automatic procedure that says amendments to the constitution have to be referred to us. One aspect of our jurisdiction is that we can go in for abstract review of new bills that are being proposed to be acts of Parliament, and similar review of legislation of the provinces. A certain percentage of the members of these bodies -- twenty or thirty percent, I forget the exact numbers -- can refer matters to us for abstract review. So an amendment could be referred to us in that particular way. But there is no automatic procedure. It might be, that in terms of the

extra procedures required for amendment over and above the two-thirds majority being drafted by the assembly, some provision of that kind could be included. But I would not really expect that that would be so.

Regarding the future of the Thirty-Four Principles, I do not know. We left that matter open. Certainly they would have some value as guides to understanding and interpreting the constitution. But whether or not amendments in the future could violate those Principles is a matter that we left open.

In the course of debate, rather than in our judgment itself, we raised the question of whether or not there are certain

fundamental features of the constitution that could never be amended: its basic democratic structure, or certain fundamental freedoms.

Say, for example, Parliament, with a two-thirds majority, following all the correct procedures, extended its life for another fifteen years; or say, the majority in Parliament said, "during the next elections our party will have free air-time on the television every night and no other party will have access to the television," and there was sufficient voting support for it to get through, there would be technical compliance with the amendment procedures.

What would we do? Well some of us from the bench have expressed the view that a

situation like that might involve not an amendment to the constitution, which presupposes you maintain the basic structure but you amend aspects of it, but an abrogation of the constitution. And that might be impermissible. That was done in India, when what were called certain fundamental features of the constitution were held not to be amendable. The Namibian constitution has certain provisions that cannot be amended at all. They are permanent. The German constitution also has certain features like that. Our new constitutional text does not. But it might be possible to read in or imply such a fundamental power of judicial review to

maintain the basic democratic order in our country. The Principles could play some role in justifying something like that.

In methodological terms we did not follow the procedures used at the United Nations, for example, in the drafting of the International Conventions on Civil and Political Rights and the International Covenant on Social, Economic, and Cultural Rights. That belonged to a process of give-and-take in negotiations and drafting appropriate to an international body with lots of states represented. And there are all sorts of techniques used to try and achieve consensus, allowing for reservations and all the rest. We did not look at their

particular methodology. Basically, we looked at universal instruments as a primary source for what is universally accepted. But often these instruments are not definitive.

Take, say, the Universal Declaration of Human Rights: It is not a normative, legally-binding document as such. It has entered into parts of international customary law. It is a very important symbol and aspirational lodestar if you like, but there could be items in there that are not universally accepted as constitutionally protected rights. So we also looked at lots of constitutions, and we tried to work out some kind of formula appropriate in that respect.

I will describe the role of public participation in the constitution-making process. The Constitutional Assembly was given two years to draft the new constitutional text. And of course you work until midnight of the last day of the last year, and that is when lots of the final crunches take place. You could almost hear the crunches throughout the whole country, with the Assembly working right through the night to get the text done in time! But before that, there was very extensive popular consultation and involvement. There were programs on television every week, debates about constitutional questions. And they were not debates between political leaders.

Somebody would pose a problem, say capital punishment, which was quite hotly debated. And then representatives of different parties and tendencies would argue and debate and shout at each other. No vote was taken, no conclusions were drafted. The public was not asked afterward, "Who do you think won the debate? Did you win on points or was it a draw?" It was not like that at all. It was just to ensure lively involvement and interest.

In addition, some millions of copies of the basic text and the options were printed. There were lots of cartoons and explanations sent out for people to write in with their comments. I think something like 2.7 million

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comments were received. That sounds a lot -- that is a lot. But one million was just over one issue, where people mobilized and got lots of signatures.

The fact was that they found that the radio and television programs increased basic knowledge and understanding of the constitution-making process from something like thirty percent to something like seventy percent. I doubt that seventy percent of American people would be able to give even minimal explanations of the American Constitution. I am sorry to say that. People will know different aspects, but here was our population so involved -- it is an historic process, not just a legal process.

It is a process of becoming ourselves and achieving our dignity as a nation, as a people. And so there was intense interest, particularly among poor people, who take constitutionalism very, very seriously because that is going to be the guarantee of a dignified life for them in the future. Even when it came to the objections in our final phase -- we had advertisements placed in the newspapers inviting objections, and we got them from all over the country, from all sorts of different quarters.

Whether or not the Constitutional Assembly will meet their final deadline remains to be seen. If they do, there will be a new advertisement put in the press and

over television, and then the public will be invited again to look at the changes and to see what comment they have to have on that.

We all, to be quite honest, are rather

fatigued with this process. We all would

like to see the process completed. We would

like to live under our new constitution, but

we are not going to take shortcuts in order

to get there.

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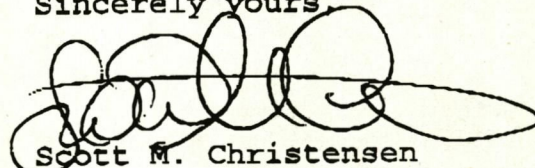
Dear Justice Sachs:

Please let me know at your earliest convenience what editorial changes you would like made to your article. Please feel free to fax any or all pages to (212) 995-4032.

We are also publishing a lecture by your colleague, Justice Richard Goldstone, who would like his article to appear as soon as possible. We would like to include your article along with his in an issue we will send to the printers in the next few weeks.

If you did not receive the copy of your edited text I sent a few weeks ago, please let me know as soon as possible and I will send them again. Looking forward to hearing from you soon, I remain,

Sincerely yours,



Scott M. Christensen
Editor-in-Chief