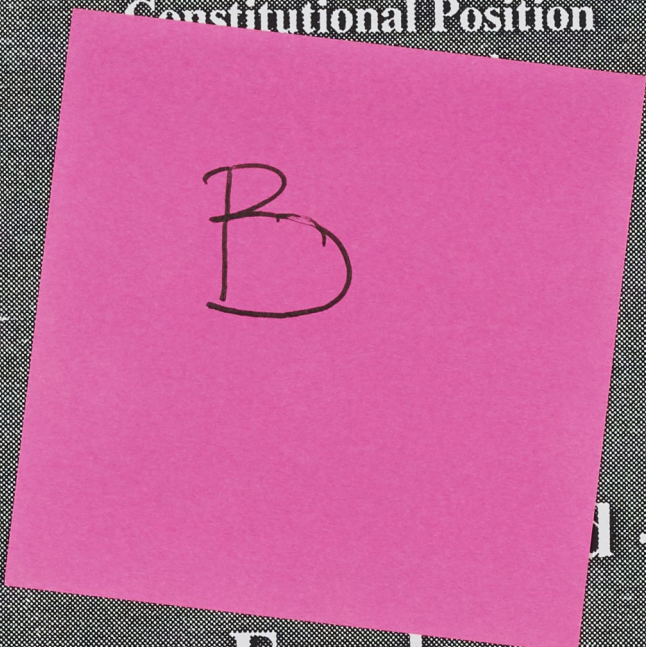


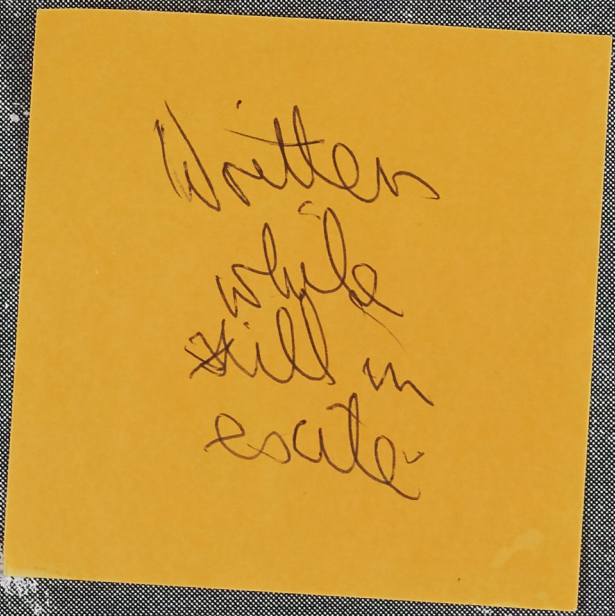
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The Future Constitutional Position



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**The Future
Constitutional Position
of White South
Africans**

Some Further Ideas

**The Last Word -
Freedom**

Albie Sachs

London, January 1990

THE LAST WORD - FREEDOM

We give the last word to freedom, yet we do not know what it is.

This is the central irony of the deep and passionate struggle in South Africa - that it is for something that exists only in relation to what it seeks to eliminate.

We know what oppression is. We experience it, define it, we know its elements, take steps against it. All we can say about freedom is that it is the absence of oppression. We define freedom in terms of the measures we need to take to keep its enemy, tyranny, at bay.

Tyranny in South Africa means apartheid. That is the form that oppression takes. It is also the negative indicator of freedom; freedom is what apartheid is not.

When the call went up in the 1950's: "Freedom in our lifetime" it signified the end of something very specific, colonial domination in Africa and apartheid tyranny in South Africa. The Freedom Charter adopted in 1955 was conceived of as the reverse of apartheid. A product of struggle rather than of contemplation, it sought in each and every one of its articles to controvert the reality of the oppression the people were undergoing. Its ten sections were based on the demands that a suffering people sent in, not on any ideal scheme created by legal philosophers of what a free South Africa should look like.

Any new constitution in South Africa must be first and foremost an anti-apartheid constitution. The great majority of the people will measure their newly won freedom in terms of the extent to which they feel the arbitrary and cruel laws and practices of apartheid have been removed. Freedom is not some state of

exaltation, a condition of instinctive anarchy and joy, it is not sudden and permanent happiness [in fact, some of the freest countries have the most melancholic and stressed people].

Freedom means being able to do what formerly was unjustly forbidden. If the majority of the people can vote where they could not vote before, this will be freedom. If they can move as they wish, live where they want, feel at home everywhere in the country, this will be freedom. If they can speak openly and say what they believe, support the organisations they agree with, criticise those in authority, this will be freedom. If they can feel comfortable within themselves, have a declared pride in who they are and a sense that they are recognised by the world they live in, then they will be free.

Freedom is indivisible and universal, but it also has its specific moments and particular modes. In South Africa the mode of freedom is anti-racist, and anti- all the mechanisms and institutions that kept the system of racism and national oppression in place.

Yet if anti-apartheid is the foundation of and essential precondition for freedom in South Africa, it is not of itself and on its own a guarantee of freedom.

The very thing that brings joy to the oppressed majority, namely, the end of the system they have always known, is exactly what induces apprehension in the oppressors. Those who traditionally have supported apartheid, and who today might concede, happily or reluctantly, that apartheid is wrong and doomed, are alarmed at what might happen to them when the structures they have lived by are destroyed.

The constitution has to be for all South Africans, former oppressors and oppressed alike. It expresses the sovereignty of the whole nation, not just a part, not even just of the vast majority. If it is to be binding on all, it should speak on behalf of all and give

its protection to all. In the past, rights for the one has meant tyranny for the other. Does that imply that the freedom of the oppressed can only be achieved by means of a new form of domination, this time of the majority over the minority, of black over white? Will freedom be guaranteed for all, or only for most South Africans? Or will the principle be followed that the constitution does not see majorities and minorities, as apartheid has always done, but only citizens, each as important as the next?

Secondly, the elimination of apartheid does not by itself guarantee freedom even for the formerly oppressed. History unfortunately records many examples of freedom-fighters of one generation becoming oppressors of the next. Sometimes the very qualities of determination and sense of being involved in an historic endeavour which give freedom-fighters the courage to raise the banner of liberty in the face of barbarous repression, transmute themselves into sources of authoritarianism and historical forced-marches later on. On other occasions, the habits of clandestinity and mistrust, of tight discipline and centralised control, without which the freedom-fighting nucleus would have been wiped out, continue with dire results into the new society.

More profoundly, the forms of organisation and guiding principles that triumphed in insurrectionary moments, on long marches, in high mountains, that solved problems in liberated zones, might simply not be appropriate for whole peoples and whole countries in conditions of peace.

These reflections have led some people into arguing for inaction against apartheid because of their concern that removing one tyranny might lead to its replacement by another.

From a moral point of view, it seems most dubious to refrain from dealing with an actual and manifest evil because of anxiety that its elimination might lead to the appearance of another evil. Sufficient unto the day is the evil thereof - the best time for fighting for freedom is always now, and the best starting point is

always here.

Usually those who claim to prefer the evil they know to the evil they don't know, come from a class that derives at least some benefit from the existing system. Oppression is for them something they hear about from others, something they dislike intellectually but do not suffer themselves. The possibility that they might be concrete victims in the future carries more weight than the fact that their fellow-citizens are being ill-treated today; sometimes, in a narcissistic way, they even cast themselves in the most tragic role of all, that of the helpless victim in the middle, powerless to affect events. For those suffering under oppression, on the other hand, the fact that there might be arbitrariness and abuses in the future counts for far less than the need to counteract the violence being done to them today.

In any event, whatever the stand-point, the question of guarantees of freedom for all is an important one that needs to be confronted now. It has a bearing both on the character of the constitution and the process whereby the new constitution is to be brought about.

There can, of course, never be absolute guarantees in history. What we do know for sure is that attempting to defend minority privileges by force of arms, whether through the present system, or whether by means of a constitution based on group rights, can only result in continuing strife and violation of human rights. The only system that has a chance is that which is based on non-racial democracy. What we need to do is to strengthen the prospects as much as possible for it to be brought about as swiftly, securely and painlessly as possible.

A democratic constitution is one and entire. It does not have 'own affairs' sections - one set of guarantees for the blacks, another for the whites. A constitution is a document with an intellectual reach into the future. It is our generation that drafts it in the light of our historical experience and the thought of our age,

but we consciously attempt to produce something that will last. If we wish to break down the habits of thinking in racial categories and to encourage the principles of non-racial democracy, we must produce a constitution that contemplates the rights of all the citizens of our country, not just of a section, however large and however abused in the past.

To be effective, the constitution must be rooted in South African history and tradition. It must draw on the traditions of freedom in all communities, not just those who at this historical juncture are in the forefront of the freedom struggle.

There is in fact not a section of the population, whatever its position today, that has not at some time in its history fought for freedom. Many of the foreparents of the whites who live in the country today were refugees from persecution, the Huguenots who fled from massacre because of their faith in France, the Jews who escaped from pogroms and then from Nazi terror. Thousands of English-speaking whites presently occupying important positions in the professions and public life, volunteered for military service against Nazism and fascism in Europe and later marched in the Torch Commandos against the extension of racist rule in South Africa.

South Africa has had an unusually large number of bishops who have been willing to go against the tide, usually stronger in their own churches than outside, as well as of writers and journalists and lawyers and academics and medical people, (even at least one freedom-fighting dentist and two road engineers).

There is not an Afrikaans-speaking white family that was not touched by the struggles over the right to speak Afrikaans and have an Afrikaner identity; Boer heroism against the might of the British Empire became legendary throughout the world, and is part of South African patrimony, just as the concentration camps in which thousands of civilians died are part of our shame.

Workers from all over the world, driven by hunger and unemployment, came to work on the mines in South Africa, where they died in huge numbers of lung disease; hundreds fell at the barricades, gun in hand, as they fought against reduction in wages, and the tradition of singing freedom songs as patriots faced execution was started by four trade unionists who sang the Red Flag as they mounted the gallows.

Many South African women joined the suffragette movement and challenged the physical, legal, and psychological power of male rule.

Apartheid has distorted this history, subordinating each and every action to its racist context, suppressing all that was noble and highlighting all that was ugly. The ideals of democracy and freedom are presented as white ideals, the assumption being that blacks are only interested in a full stomach, not in questions of freedom. Daily life refutes this notion.

It is the anti-apartheid struggle, not the white presence, that has kept democracy alive in South Africa. Anti-apartheid in South Africa has come to mean pro-democracy. The principles of non-racial democracy have for decades now become part and parcel of the anti-apartheid movement, and through it, have emerged as strong themes in South African life. It is not just the number of organisations that have indicated support for a document such as the Freedom Charter that proves this, but the growth of a powerful, alternative democratic culture in the country. The culture of democracy is strong precisely because people have had to struggle for it.

In the last resort, the strongest guarantee of freedom in South Africa lies in the hearts of the oppressed. It is they more than anyone who know what it is like to have their homes bull-dozed into the ground, to be moved from pillar to post, to be stopped in the streets or raided at night, to be humiliated because of who their parents are or on account of the language they speak. Inviolability

of the home, freedom of movement, the rights of the personality, free speech - they fight for these each and every day. If the constitution is suffused with the longing of the ordinary people for simple justice and peace, then freedom in South Africa is ensured.

It could have been otherwise. There could have been a movement which accepted the racist premisses of apartheid, but simply reversed the roles. Instead, the anti-apartheid movement based itself on establishing a better and more moral system than the one it dedicated itself to overthrow. The ideals of democracy were nourished in the hard soil of Robben Island, in the underground, in exile. They were taken up by the churches and other religious bodies, they were integrated into the life of the trade union movement. Journalists, lawyers, teachers, doctors and nurses challenged apartheid with democratic ideas.

Thousands of community organisations were established throughout the country with a view to creating democracy at the grass roots level. A great deal of experience was gained during this period, a great part of it positive, some of it negative. It has all been discussed, theorised about, argued over. People are more aware than before of the immense possibilities and also of the dangers of exercising power at the local level. Mistakes have been made and cruel things done in the course of the struggle, but there has never been any acceptance of the idea that the viciousness of apartheid and the nobility of the democratic idea permit the use of vicious means in the fight against oppression.

Constitutions can have many meanings. In the first place, they establish the structures of government, and lay down how political power is to be exercised. Yet a constitution does much more than indicate the political and legal organisation of the state. It serves as a symbol for the whole of society, as a point of reference for the nation. People like to feel that they have constitutional rights even if they do not exercise them. The existence of a constitution is an indication that society is ruled by steady and

known principles of law and not by the arbitrary whims of persons. Like the flag, the anthem and the emblem, the constitution stands above everybody and everything and symbolises a shared patriotism binding on all.

The constitution can also serve as an educator. Its language is appealed to in all sorts of situations, it is studied in school, it integrates itself into the general culture of the society. The language of freedom in the constitution becomes part of the discourse of the people.

In South African conditions the constitution will in addition be a compact, solemnly entered into by democratically chosen representatives of all the people, emerging out of strife, with the sense of and commitment to the creation of a set of rules in terms of which all can live together with pride and in peace.

Above all, the constitution is a vehicle for expressing fundamental notions of freedom, at the conceptual, symbolical and practical levels. In South Africa this aspect has special importance. An effective Bill of Rights can become a major instrument of nation-building. It can secure for the mass of the people a sense that life has really changed, that there will be no return to the oppressive ways of apartheid society, while at the same time it can give to those who presently exercise power the conviction that their basic rights can be guaranteed in the future without recourse to group rights schemes.

It will be one constitution with one generalised set of provisions guaranteeing basic rights and freedoms to all. Some might look with special interest at the sections dealing with freedom from fear. Others might focus on the question of freedom from want. Many would be concerned with the third great freedom, namely, freedom from insult.

Each set of provisions will be important in itself. The classic civil, political and legal rights - the so-called first generation of

human rights - need to be autonomously defended through the classical mechanisms of elections, free speech and judicial review. The second generation of rights - social, economic and cultural rights - are no less important. They too will be attended to by appropriate mechanisms, in which Parliament will play a key role.

The right to be free and the right not to be hungry are each fundamental human rights to be defended and fought for as vigorously as possible. One cannot permit the existence of the one to negate or diminish the importance of the other. The fact that there needs to be a great national effort to combat hunger and homelessness is no reason for cutting back on freedom of speech or the rights of access to the courts. Similarly, the fact that citizens can run to their lawyers and get a court order in their favour in no way mitigates the need to provide a legal framework for the combat of hunger. The constitution is not unfriendly to private philanthropy, but does not see it as a substitute for the progressive materialisation of rights.

Similarly, the third generation of rights, namely the rights to peace, development and respect for the environment, will also be integrated into the constitution. It is only in recent years that these have begun to crystallise out as legal rights, and much still needs to be done to provide appropriate formulations and remedies. We cannot expect an elephant to apply for habeas corpus, but a generalised principle of interpreting all laws in a way that favours conservation, and the imposition of ecological duties on local authorities plus the creation of a citizen's remedy such as the Indian Supreme Court has pioneered, could meet the situation.

For many years, supporters of majority rule looked with suspicion on the idea of a Bill of Rights and the rule of law. On the other hand, proponents of entrenching fundamental rights and freedoms, balked at the notion of one person one vote. Two currents that for a long time tended to flow in different directions are now joined together. In turn, solving the questions of political

rights and of fundamental liberties makes it possible to give guarantees in relation to the aspect of cultural diversity. All taken together make it possible to contemplate manifestly fair procedures for regulating the process of eliminating the inequalities created by apartheid.

Spelt out in terms of constitutional principles, one can envisage the following cluster of entrenched guarantees:

- The constitution will be designed in such a way as to ensure full and equal participation in political and civil life for all South Africans, irrespective of race, colour, gender or creed.
- Discrimination on the basis of race etc will be outlawed, and machinery created to prevent insult, abuse, or ill-treatment on such grounds.
- There will be a multi-party system with freedom of speech and assembly and periodical elections to choose Parliament and the government.
- There will be a Bill of Rights guaranteeing fundamental human rights and liberties to all citizens. This Bill of Rights will be entrenched in the constitution and will be justiciable, that is, persons alleging infringements of their rights will be able to seek a remedy by recourse to the courts. Provision should be made to ensure equal access to the courts independently of financial means.
- The application of the doctrine of the separation of powers will establish a system of checks and balances between Parliament and the executive, and guarantee that the judiciary is independent in fulfilling its functions of upholding the rule of law and defending the principles of the constitution.
- Steps will be taken to ensure that there is vigorous government at the local and regional levels subject to the principles of permanent accountability and active community participation.

- Within the context of a single citizenship and a common patriotism and loyalty, the diversity of the South African population will receive constitutional recognition through provisions guaranteeing the free expression of religious, cultural and linguistic rights.
- The opening up of equal opportunities for all and the process of redistribution of wealth in the country will be conducted according to constitutionally defined principles covering public interest, affirmative action and fair procedures, with the courts having the power of judicial review in relation to the defence of these principles.

These are not provisions for black South Africans or for white South Africans, but for all South Africans; the last word goes to freedom.

This is the first draft of a paper intended to provoke thought about aspects of a future constitution, and about what should be done now to prepare the way for change. Readers are invited to send the comments to me care of:

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