

SOME NOTES ON CONSTITUTIONALISM AND FUNDAMENTAL RIGHTS IN AFRICA

ALBIE SACHS
First Draft -

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SOME NOTES ON CONSTITUTIONALISM AND FUNDAMENTAL RIGHTS IN AFRICA

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First Draft - Not to be quoted until revised

There are three ways of looking at constitutionalism and fundamental rights in Africa. The first is offensive, the second shameful and the third well, we will come to the third.

The first and most obnoxious approach, is to see it as an extension of a civilizing mission of the North vis-a-vis the South. In terms of this view, Africa is characterised by barbarism and anarchy and has to be subjected to a form of constitutional as well as economic structural adjustment. The truth is that barbarism knows no boundaries, neither of continent nor of country. The great Universal Declaration of Human Rights was a reaction to European not African barbarism. The current carnage in former Yugoslavia is yet one more bitter reminder that there are no parts of the globe automatically free from violence and oppression. So we can say emphatically that the distribution of virtue and viciousness in the world follows no geographical or racial divide. Indeed, nations that have yet to acknowledge fully the devastation they caused to the enjoyment of fundamental rights in Africa through their practices of slavery and colonialism lack the moral authority to point accusatory or patronising fingers at our continent.

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The third approach is of a completely different order. It starts with the knowledge that constitutionalism and human rights are affirmed not to prove anything to anyone else, but to defend our own dignity and to solve our own problems. When we say that certain principles of democracy and human rights are universal, this is what we mean. Their universalism stems not from their being developed in one part of the world and then forced upon the rest of the world. On the contrary, their global character comes from the fact that they respond to the needs of people in all continents and become instruments to enable everyone to live better lives. This has been our experience in Southern Africa. The human rights ideal was kept alive not by the oppressors who claimed to be defending some sort of civilization, but by the oppressed. International pressure, based on the affront which colonialism, racism and apartheid represented to internationally accepted principles of human rights, helped to bring about major changes. At the same time, we in Southern Africa, through our struggles and through our patient negotiations, have enriched the world treasury of human rights ideas. We have great hopes that with the dismantling of apartheid in South Africa, we will see the whole region progressively developing a strong human rights culture which will feed into world ideas and practice. The traffic in progressive ideas can never be one way.

Far from being foreign imports, constitutionalism and respect for human rights have special value in Africa. They can:

(a) Provide an institutional and juridical framework for the continuity of liberation ideals. One of the most disappointing features of post-colonial Africa has been the extent to which the high idealism, willingness to sacrifice and respect for human aspirations of the liberation period has often been followed by disenchantment and even disillusionment after independence. One reason for this has been the lack of institutional embodiment of the noble impulses of the freedom struggle. You cannot leave everything to the goodwill of leaders. In fact, it is unfair on the leaders themselves not to give them a secure framework of principles and values within which to function. They should be freed to use their experience and energies to lead and not to feel that they have to carry the whole destiny of their countries on their own shoulders.

(b) Reinforce institutional stability in times of rapid political, social and cultural change. Having agreed

principles, institutions and processes facilitates rather than retards changes. The alternative would be for those with competing interests to fight over every detail, since to give way on a small matter might be seen as conceding on the larger issue.

(c) Enable people of diverse origins and cultures to live together in dignity and as equals in the same country. The constitutional right to be different is supported by the constitutional right to be the same. Constitutionalism, based on the concept of common citizenship, enables us to get out of the endless cycle of domination and subordination. By acknowledging diversity of culture, language, religion, and ensuring that none is given a privileged or hegemonic position, people are encouraged to exercise their rights of culture and personality in a free and non-competitive way.

(d) The constitutionalising of political pluralism reduces pressures on political institutions and diminishes the temptations to utilise the army or other instruments of force to dislodge opponents.

(e) Encourage active participation by citizens through creating open and accountable forms of government, where criticism of the administration is seen as something healthy and beneficial to good government rather than a challenge to the honour or power of those in office.

(f) Promote the growth of lively community organisations and a rich civil society that have secure constitutional space within which to function and that ensure that interaction between NGO's and the State is active and productive.

One may add two further benefits of a profound nature. Both have a more theoretical character, but important practical implications.

(g) Remove certain matters with potential for severe polarisation from the political arena during the period when stable institutions are being created. This is an idea that I heard from Roberto Unger at Harvard last year. The concept is that the parties who negotiate the terms of the constitution agree to formulate certain broad principles which will be implemented by the judiciary in a way which discourages political mobilisation which could threaten institutional stability. He envisages this process as one of postponing for an agreed period divisive political debate on these issues. One should add that what he has in mind is

not some kind of dishonourable deal which has the effect of storing up and postponing resentment, but the adoption of broad formulations based on common positions which enable the concrete disputes to be subjected to the evolution of time.

(h) Develop constitutional patriotism. This is an idea promoted by the distinguished German social philosopher, Professor Habermas. It enables members of society to feel joined by a common allegiance to the constitution and certain binding fundamental values rather than to the state as such or to political party or leaders. Citizens can then enthusiastically show allegiance to parties of their choice without feeling that they are subordinating themselves to fallible organisations or personalities and without blinding their critical sensibilities. In the German context it meant choosing an identity based on shared pluralistic values of a democratic kind rather than on ties of blood. In the African context the concept of constitutional patriotism enables us to identify with the freedom struggle and the highest aspirations of all without subordinating ourselves to any form of institutionalised or officialised mythology. It keeps the struggle alive by building on past achievements of past generations of freedom fighters. It is an inclusive philosophy which allows everybody to participate and make original and creative contributions independently of the positions adopted by their forefathers and foremothers.

A constitution alone is not enough, however well constructed and well written. You can have a constitution without constitutionalism. This was our experience in Mozambique after independence in 1975. The constitution was strong on incorporating the spirit of freedom which had inspired the struggle for national liberation. It set out a number of fundamental rights of citizens. Yet it contained no clear mechanism of enforcement. The defence of the rights of citizens was left entirely to the political process. The process itself was restricted in that a single political party was designated as representing the highest aspirations of the nation. There was no space for legitimate political opposition. At the time, this seemed to correspond to the needs of unity and nation building. Multipartyism was regarded as a weapon of division which would inevitably be used by colonialist and racist forces to foster tribalism, regionalism and racism. In fact, the existence of a single party state meant that opposition took the form of clandestine resistance strongly supported by racist and colonialist forces. To make matters worse, what could have

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been political dispute turned into civil war with the combatants backed by outside states and locked into global conflicts. The result was devastation and massive denials of human rights through war, massacres, hunger and displacement. One of my most interesting activities during the last period of my contact with Mozambique was to analyse proposals for redrafting the constitution so as to embody recognition of pluralism and the protection of fundamental rights through defined instruments. I think we can say that there have been two major shifts in Southern Africa in recent times. The first, and most profound, has been from racist societies to ones based on principles of equality. The second has been from the notion of people's power to one of people's rights. Putting the emphasis on people's rights establishes a different relationship between the state and the people. Instead of the people, as it were, conferring all power on the state to act in their name and on their behalf, it implies an ongoing and interactive relationship between the people and the state. Furthermore, it acknowledges that the people do not constitute a homogenous entity with a single set of aspirations. On the contrary, the people are diverse and possess a multiplicity of contradictory interests. Thus those in the towns and those in the country areas might have different claims on resources. The people are made up of men and women whose interests do not always inevitably coincide. The interests of employed and unemployed, the housed and the homeless, the educated and the illiterate, might be the same in broad fundamental terms, but could be quite different in concrete situations. The political/legal system should be able to cater for this diversity of interests by establishing a common set of values and an agreed basic process for handling these differing claims.

It is also possible to have constitutionalism without a constitution. As is well known, the United Kingdom does not have a written constitution. There is no fundamental law that can only be changed by a complex process of amendment. There is no written text that automatically has supremacy in relation to any future statute. Yet because of a political culture developed over a long period of time and, more recently, under the impact of European Convention of Human Rights, a quasi-constitutional state has evolved in which certain broad principles of a constitutional character have considerable weight. Colleagues of ours at this moment are arguing, for example, that the principle of equality has become so bound up with the very character of law in England that it has virtually taken on the force of a constitutional principle. Technically, it is still possible for an express Act of Parliament to override this principle but it would

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have to be in the most direct and compelling language for it to accomplish this end. Similarly, some judges are arguing that the principle of judicial review has become so entrenched that not even Parliament has the right to oust it anymore.

Whatever the outward forms, one can see that for constitutionalism to be meaningful certain conditions need to be met.

First, how the constitution was achieved. Perhaps we in South Africa feel particularly optimistic because our new constitution was home-grown and emerged out of three hard years of intensive negotiations. The process is not yet over. Parliament sitting as a whole in the form of a Constitutional Assembly will draft the final constitution. This will have to comply 34 agreed constitutional principles, all of which have been formulated taking into account both universal concepts and South African realities. The historical process in other countries has been different. Frequently constitutions were negotiated far from the African continent by parties that did not have equal negotiating power. The influence of the drafters who were technicians steeped in the realities of Europe can be strongly felt. Certain model clauses were simply transferred from one constitutional document to another. The sense of ownership and participation by those who were to live under the constitutions was lacking. The language was frequently highly technical and difficult for ordinary people to understand. The institutional arrangements were often clumsy in character and not well adapted to the social, cultural and political realities of the country concerned. This is not to say that the documents produced did not represent bona fide attempts by the drafters, as they saw it, to implant democracy and constitutionalism in Africa. It was rather that the process of constitution making itself represented the unequal bargaining powers of the different sides. It also corresponded to an over-optimistic view of how institutions could be transplanted. What was lacking was a strong indigenous participation. The thinking at the time was that all that was necessary was to enter the political kingdom, and all else would be added. We in South Africa have benefitted from reflecting on hard experiences which followed. Our constitution, accordingly, has deep roots in the history, consciousness and claims of our people. For this reason, we are hopeful that it will endure and become ever stronger as a feature of national life.

Second, the constitution needs constant institutional reinforcement. Not only is a constitution only as good as the judges who interpret it, it is only as good as the legal profession that presents cases and it is only as good as the law schools that produce people who are not only technically capable but imbued with the fundamental values that underlie the constitution.

One of the most enticing prospects for all of us in Southern Africa in this period is to establish cross-frontier relationships between judges, lawyers and law schools. We all have much to learn from each other. We in South Africa have a painful history and a powerful capacity. We will have to learn not to impose either on our neighbours. At the same time, we have much to share. Your experience in many respects is well ahead of ours. You have tackled problems ranging from transforming the public administration, the judiciary, local government and the armed forces. You have dealt in different ways with hard problems concerning the relationship between traditional law and state law. We need to benefit from your experience, take advantage of your successes and try not to repeat your mistakes. Open and friendly dialogue should be the order of the day. At a later stage we could start giving serious attention to creating regional human rights instruments which could function within the framework of the African Charter of Human and People's Rights.

Third, each country has to work out for itself what instruments beside the courts should be created to secure the protection of fundamental rights and respect for the constitution. In South Africa, we have done a number of things. We have built into government a series of semi-independent institutions, such as the Reserve Bank, the Fiscal and Finance Commission and the Public Service Commission whose function it will be to resist populist pressures and stand aside from the immediate questions of political advantage, with a view to ensuring the long-term integrity of government. We have also introduced a number of institutions which will work side by side with the courts in respect of protecting and advancing human rights. Thus we have the Office of the Public Protector who will function as an Ombud in relation to abusive or corrupt public administrators. We are in the process of setting up a Human Rights Commission which will have extensive powers to do research into violations of human rights, propose proactive measures of dealing with such violations and intervene to provide remedies in such cases, acting in conjunction with the courts. A Land Claims Commission and a Land Claims Court are being set up in the context of clear

constitutional guidelines and precise legislation which aims to balance out the interests of all concerned. The constitution also provides for the creation of a Commission on Gender Equality which is envisaged as a body designed to enable women to overcome burdens imposed upon them by sexism and discrimination.

Fourth, a lively and affirmative civil society is one of the main guarantees of constitutionalism. This affects both the character of rights which are claimed and the process which will be followed before the courts. It is difficult to imagine the development of rights for workers or for women or for disabled people or for religious persons without the existence of trade unions, women's organisations, a disabled people's movement and organised religious communities. Freedom of speech is extended and deepened when there is a pluralistic press and a body of confident broadcasters. It is particularly the poor, the marginalised and the disadvantaged who need community organisations to defend their interests and to ensure that government dedicates itself to its constitutional promise. There were times in India where the Supreme Court acting in conjunction with community-based organisations kept aloft the noble ideals of the independence constitution when Parliament seemed to be fading into paralysis and the corruption of office.

Fifth, a broad culture of respect for human rights needs to become part and parcel of the way of life of society. The courts should be the last refuge of the oppressed, not the first. An active public opinion, a lively political process and a sense of right and wrong ways of doing things should imbue every aspect of the country's life. In this respect, historic experience is the great teacher but not the only one. There is a need for a variety of NGO's, which consciously set about encouraging popular awareness of basic rights. Hopefully, the courts themselves will find the way to tune into and reinforce a deep sense of fundamental right in the community, rather than invent a strained and artificial discourse that seems to have no relevance to the life of ordinary citizens. It is important that legal reasoning take place within the context of principles of an enduring character. There must be continuity in the points of reference. A judgement should not aim to be a newspaper editorial or an election pamphlet. Yet it need not be in language so dense and impenetrable that people reading it need to get another judge to interpret its meaning to them.

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