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Fax (021) 222626  
Tel (021) 222424

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80 St George's Mall  
P O Box 3684  
CAPE TOWN 8000

**FAX COVER SHEET**

**DATE** : 12 AUGUST 1992

**TO** : CENTRE FOR SOUTHERN AFRICAN STUDIES  
UWC  
FAX NO :959-3041

**ATTENTION** : TIXIE MABIZELA

**SUBJECT** : RUTH FIRST MEMORIAL COLLOQUIUM

**FROM** : ALBIE SACHS

**TOTAL NUMBER OF PAGES (INCLUDING THIS PAGE):** 2

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Albie has just returned from overseas and I attach an abstract of his paper. Please let us have a copy of the programme for the colloquium.

Yours sincerely



**SUSAN RABINOWITZ**  
ASSISTANT TO ALBIE SACHS

Encl:

## **ABSTRACT**

### **PERFECTIBILITY AND CORRUPTIBILITY - BY ALBIE SACHS**

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The idea of constitutionalism and a Bill of Rights is something relatively new for people on the Left. Yet it would be a great mistake to hand over the concept to those who would give it a restricted and conservative meaning. In a grossly unequal society like South Africa the principles of constitutionalism can provide a powerful lever for advance for those who have been historically oppressed. It corresponds to the situation in which the existing political and economic power has not been destroyed but in which political and community organisations of the oppressed have achieved strong positions. It provides the framework for advancement and redistribution in a way which minimises the dangers of civil war and economic destruction. Above all, it establishes mechanisms which reduce the danger of a new bureaucratic and authoritarian elite emerging to maintain oppression in new forms.

The paper explores ideas connected with the character of a Bill of Rights for South Africa and emphasises the importance of a broad perspective and wide popular participation in the development of a Bill of Rights.

## **ABSTRACT**

### **PERFECTIBILITY AND CORRUPTIBILITY - BY ALBIE SACHS**

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The idea of constitutionalism and a Bill of Rights is something relatively new for people on the Left. Yet it would be a great mistake to hand over the concept to those who would give it a restricted and conservative meaning. In a grossly unequal society like South Africa the principles of constitutionalism can provide a powerful lever for advance for those who have been historically oppressed. It corresponds to the situation in which the existing political and economic power has not been destroyed but in which political and community organisations of the oppressed have achieved strong positions. It provides the framework for advancement and redistribution in a way which minimises the dangers of civil war and economic destruction. Above all, it establishes mechanisms which reduce the danger of a new bureaucratic and authoritarian elite emerging to maintain oppression in new forms.

The paper explores ideas connected with the character of a Bill of Rights for South Africa and emphasises the importance of a broad perspective and wide popular participation in the development of a Bill of Rights.



University of the Western Cape

Universiteit van Wes-Kaapland

Centre for Southern African Studies

Private Bag X17  
Bellville, 7535  
South Africa  
Tel. Add: UNIBELL, S.A.  
Tel.: 959-3040/1  
Fax: 959-3041

Privaatsak X17  
Bellville, 7535  
Suid Afrika  
Tel. Ad: UNIBELL, S.A.  
Tel.: 959-3040/1  
Fax: 959-3041

FAX COVER SHEET

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DATE: 1992 July 22

FROM: RFM COMMITTEE / ROB DAVIES

FAX NO. [27] 021 959-3041

TO: ALBIE SACHS

FAX NO: 021 - 22 2626

NO. OF PAGES INCLUDING THIS ONE: 1

MESSAGE: RE: RUTH FIRST MEMORIAL  
THIS FOLLOWS OUR CIRCULAR OF 17 JUNE 1992

- \* 1. THE SUMMARY ABSTRACT (OF 1 PAGE OR LESS) OF YOUR PAPER IS NOW LONG OVERDUE. OUR PREPARATIONS ARE HAMPERED. WE MUST HAVE IT BY FRIDAY 24 JULY OR SATURDAY 25 JULY.
2. YOUR PAPER MUST REACH US BY 27 JULY 1992. TRAVEL ARRANGEMENTS FOR SOUTH AND SOUTHERN AFRICAN PRESENTERS CAN ONLY BE PROCESSED ON RECEIPT OF PAPERS.
3. PRESENTERS ARE ADVISED THAT PRESENTATION TIME SHALL BE 20 (TWENTY) MINUTES PER PAPER. THIS SHALL ALLOW FAIR DISCUSSION TIME AS 34 PAPERS HAVE BEEN OFFERED AT LEAST.
4. WE REPEAT - AS PER OUR CIRCULAR OF 17 JUNE THAT PARTICIPANTS SHOULD BE IN CAPE TOWN BY THE EVENING/NIGHT OF 16 AUGUST AS THE PROGRAMME STARTS EARLY ON 17TH AUGUST.

LET US HEAR FROM YOU AS REQUESTED PLEASE.

\* THIS MAY NOT APPLY IF YOUR ABSTRACT IS IN ALREADY.

\*\*\*\*\* -JOURNAL- \*\*\*\*\* DATE 10-JUL-1992 \*\*\*\*\* TIME 12:02 \*\*\*\*\*

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021 222626- \*\*\*\*\*

Fax (021) 222626  
Tel (021) 222424

1002 NBS Waldorf  
80 St George's Mall  
P O Box 3684  
CAPE TOWN 8000

**FAX COVER SHEET**

**DATE** : 8 JULY 1992

**TO** : TIXIE MABIZELA  
FAX NO: 9593041

**SUBJECT** : RUTH FIRST MEMORIAL COLLOQUIUM

**FROM** : ALBIE SACHS

**TOTAL NUMBER OF PAGES (INCLUDING THIS PAGE):** 1

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Dear Tixie

This is to confirm that I will be participating in the Ruth First Memorial Colloquium on 17 and 18 August. Can you send me the programme?

I have been asked to speak at a conference in Durban on the 18th August but would want to see the programme first for the Colloquium. In any event, can I be on the first day?

I have been doing quite a lot of writing recently, not all of which I have already presented. I will send you a copy of a paper I did in Maputo comparing Ruth and Aquino and honouring them both and the Centre for African Studies at U.E.M.

Closer to the date I will assemble something for the Colloquium. You have to forgive me. I am doing a lot of travelling these days and also getting a book ready but I hope to have something worthy of the occasion even if you only get it rather late.

With best wishes.

ALBIE





**University of the Western Cape**  
**Universiteit van Wes-Kaapland**

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South Africa  
Tel. Add.: UNIBELL, S.A.  
Tel.: 959-3040/1  
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Suid Afrika  
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Fax: 959-3041

**Centre for Southern African Studies**

17 June 1992

CIRCULAR TO ALL PARTICIPANTS

**RE: RUTH FIRST MEMORIAL COLLOQUIUM 17-18 AUGUST 1992**

The Rector's Committee organising this event requests:

1. That participants who have not yet submitted abstracts of their papers please do so
2. That all papers be received by the Committee before and not later than 27 July 1992
3. That all participants be in Cape Town by the night of 16 August and not later than 09:00 on the 17th as the presentations begins at 10:00 of that date.

We count on the cooperation of all for the success of this effort.

Mrs T Mabizela  
for Rector's Committee

## PERFECTIBILITY AND CORRUPTIBILITY

The human rights concept is based in its substance on human perfectibility, and in its procedures on human corruptibility. That is why constitutions are optimistic and pessimistic at the same time. They encourage us to choose the best amongst us as our leaders, but prepare us for the fact that they may turn out to be the worst.

It cannot be repeated too frequently: all constitutions are based on mistrust. The more devoted we are to our leaders and our organizations, the more need we have to be constitutionally mistrustful of them.

It is not only the rascals, corrupt persons and assassins whom we inherit from the past that we have to mistrust. Nor do we have to beware of the millions of so-called ordinary people who have become so steeped in the values and assumptions of apartheid society that they automatically replicate them in slightly disguised form in the post-apartheid world.

We have to mistrust ourselves.

This is not to say that we must see our role only as that of critics permanently in the opposition. Someone has to take responsibility for helping our country regather its strength and begin to function in a decent way for the benefit of all. Nor should any of us regard ourselves as being somehow more holy, more sensitive, more progressive than anyone else.

We do what we are good at. Some of us are good at picking up the human dimension of a problem, at sensing dilemmas and difficulties. We enjoy searching thorough words and phrases till we find the ones we want. Sometimes we even invent new words if that helps us. We are not afraid to be called romantics or idealists. We know we can afford to be soft because there are enough hard people around. We judge no one else, in fact admire persons who have qualities opposite to ours.

What matters is that we do not pretend iron qualities we do not possess, nor eliminate any special characteristics we might have for the sake of blending unnoticed into the collective.

Rather, we express our thoughts as they come to us. The pleasure lies in placing them in the mix of ideas, sure that they will interact and clash with the thoughts of others. We take our stand on the right to enjoy the right to be wrong, that is, the right to have the satisfaction of advancing an idea and seeing it refuted by a better one.

We are not against leadership, not against government. We are anxious to empower a new government to undo the damage of past governments and to undertake the responsibilities of all governments everywhere in the world to respond to the needs of the citizens.

At the same time, we must ensure that the new government functions well and fairly, that it does not become a new source of oppression, alienation and abuse. Oppression can come under any slogans, in any colours, and with any anthem. No one, neither king nor freedom fighter, has any divine right to rule. No one is automatically immune to the seductions of power.

Good leaders are conscious of this and struggle for good constitutions, aware of their own fallibility.

The biggest contribution our generation can make will be to provide an enduring link between our past aspirations for freedom and the lived reality of future liberty.

The constitution should be a glittering shield in which we all see our faces reflected. It is our constitution, for everyone, protector of the weak as well as of the powerful, of the former oppressed and of the former oppressors. It lays down the fundamental terms on which we all live together as equals and compatriots in the same country. It is the document which establishes that everyone matters, everybody counts, that no one is born worthless, or to be the slave or instrument of another.

In South African conditions, a non-racial, non-sexist, democratic constitution is the ultimate antithesis of apartheid, the embodiment of universal sovereignty and the epitome of the equal worth of each one of us. This is so independently of how we look, what language we speak, or where our ancestors came from.

A constitution is therefore not a deal worked out between new victors and new losers about how to share out the spoils of office. It is the fulfilment of an historic dream of the oppressed for irreversible deliverance from injustice; it is the reaching out for firm principles that will protect us all from mutual abuse and fratricide in the future; it is the declaration of a set of shared core values that will bind us together because we believe in them and not because they are imposed; it is the means for enabling us to pursue our different interests without knocking each other down, and to resolve our competing claims in a fair and non-destructive manner.

In preparing for the drafting of the terms of our new constitution, we try to involve the widest sections of the population. As Namibia showed, the process of constitution-making can bring out the best in a people and encourage a sense of shared nationhood based upon an acceptance of common values. A constitution is not a product to be sold to the people through skilful advertising. It is something that emerges from our innards, that expresses our highest idealism while protecting us from our basest temptations.

For those of us working for human rights in South Africa, the idea of constitutionalism is something new. Our legal tradition, taken from Britain, is one of parliamentary sovereignty. Accordingly, the essence of our struggle has been for the right to be represented on an equal basis in Parliament. We fought for the vote, not for a bill of rights. Now we recognize the advantages of a bill of rights as a means of providing the framework of core values within which Parliament operates.

We regard the constitution as an agreed compact enabling people to live together in a context of secure equality. A bill of rights guaranteeing fundamental freedoms for individuals does away with the necessity for special group rights, which, in the

circumstances of a country emerging from more than a century of explicit racial domination, would inevitably mean protection of group privileges. We need to ensure that democracy and the bill of rights work, and not to seek bizarre constitutional mechanisms to make the whites more equal than anyone else.

If we draw on global principles of human rights we do so not to prove that we can read the documents, or that we are civilized, but because they really speak to and for all of us.

Each freedom struggle is unique, yet the basic human experience of suffering and resistance is the same. Just as there is a terrible internationalism in torture and means of mass humiliation and destruction, so we can universalize the organized forces of hope and human goodness.

Bearing in mind the above, the following concrete scheme is proposed:

#### Principles

- \* Equal rights for all, without distinction of race, colour, gender or creed;

- \* The guarantee of all the classical so-called first generation human rights, including personal freedom, abolition of the death penalty, no detention without trial, and the rights of expression and assembly associated with a multi-party democracy;

- \* Secure constitutional space for religious, cultural, social, residents' and students' organizations and other non-governmental organizations, including human rights organizations;

- \* Acknowledgement of all the languages spoken in the country, with the possibility of designating particular languages for special purposes, such as legislation, at the national or regional levels;

- \* Recognition of the multi-faith character of the country, with the possibility of religious bodies collaborating with the state on a non-denominational basis and without losing their right to bear witness and criticize the actions of the state;

- \* Strong gender rights to protect the human rights of women;

- \* No discrimination on the grounds of single parenthood or sexual orientation;

- \* Clear defence of the rights of workers, including the right to have independent unions and the right to strike;

- \* Affirmation of the rights of children;

- \* Promotion of the rights of disabled persons not to be discriminated against and to have guaranteed access to employment and public amenities;

- \* Rights to land;

- \* Rights and duties in relation to the environment;

- \* Protection of personal property, and the right to just compensation in the case of any property taken in the public interest.

#### Derogation

There are strict controls on the power of the state to derogate from the principles set out in the bill of rights, the governing notion being that they be necessary, limited to their

specific object, clearly defined and in accordance with principles generally accepted in democratic countries.

#### Principles of redistribution

\* Equal protection, so that instead of spending of public funds being five-to-one in favour of whites, as at present, it is done on the basis of one person one rand;

\* Affirmative action to overcome the legacy of structured racial and gender discrimination;

\* Positive measures in the civil service, army, police force and prison service to bring about balanced structures based on the principles of representativeness, competence, impartiality and accountability;

\* An expanding floor of minimum social, educational, health and welfare rights, based on the availability of resources;

\* Transfer of resources from richer to poorer areas.

#### Mechanisms of enforcement

\* The fundamental rights and freedoms to be secured by an independent and representative judiciary, headed by a Constitutional Court;

\* Judicial review of legislation and executive acts in terms of their constitutionality, and of administrative acts in relation to their propriety and reasonableness;

\* A Human Rights Commission to be established by Parliament with the function of research, recommendations and acting as an agency to receive and handle complaints of human rights violations;

\* A Social Rights section of the Human Rights Commission to monitor the achievement of social rights, do research, make recommendations and obtain information for the legislature and the public. In addition, the courts will secure such social rights as are provided for by legislation, will take social rights into account when interpreting legislation and considering the reasonableness of subordinate legislation or administrative acts, and may act to restrain any diminution of social rights;

\* A Land Court will deal with disputed claims to land;

\* The question of just compensation for the redistribution of land or for the taking of property in the public interest will be dealt with by an independent tribunal with the right of appeal to the courts;

\* The office of Ombud will be created to deal with questions of rude, abusive, neglectful, corrupt or nepotistic behaviour by public officials.

#### Areas of confusion

Tyranny and abuse in the name of evil are easy to detect and denounce; those in the name of the good are more worrisome. It is not cynicism that says: physician heal thyself, constitutionalist constitutionalize yourself, freedom-fighter make sure that freedom is always in your soul.

The more we entrust, the more we distrust. That is what constitutions are about, the mixing of empowerment and accountability, of endowment and suspicion. The answer is not to do away with government or to render government immobile.

Nor is it government without constraint. It is effective

government that functions according to constitutional principles.

Just as trust and mistrust balance against each other in the constitutional scales, so do certainty and uncertainty. The uncertainty principle is in fact one of the key elements of constitutionalism. So is the certainty one; each has its own sphere.

Certainty applies to rules and procedures, uncertainty to outcomes. Thus, the rules governing criminal trials must be certain, the results of any particular trial uncertain. If the outcome of the proceedings were known in advance, it would be a show trial.

Similarly, the need to hold free and fair elections must be certain. The outcome of any election must be uncertain. If the result of the election was determined by the constitution and not by the electors, then the election would be empty. On this apparently recondite point the whole of Codesa 2 broke down. We must not be afraid of elections. Voting must make a difference. Outcomes must be uncertain. The people must have the right not only to 'chuck the bums out' but to put people into office whom they trust. The vote is necessary not only to disempower rogues and crooks but to empower good people with good programmes.

If the good people decide that at least for the period of historic transition part of their goodness will be manifested in the ability to work with and draw on the experience of others, even of those with whom they have fought bitterly in the past, their reputation for wisdom, and hence their re-electability, is likely to be enhanced.

The alternatives, then, are not government or no government, but open government or hidden government. What is sometimes called 'getting government off our backs' is simply replacing open government, with all its criticizable faults, with secret government and all its hidden vices.

Another area that has caused confusion in the debate about a bill of rights is that of privacy. From one point of view the right to privacy is at the very heart of constitutionalism. It connotes that all persons have a fundamental right to be themselves without dictation. It is the ultimate acknowledgement of personal self-determination.

A state that honours its citizens has no problem in respecting their privacy and individuality. Indeed, it can be maintained that an activist state that promotes health, education, employment and social security for its citizens gives them more choices and better chances to lead meaningful private lives than one which abandons them to the tyrannies of disease, ignorance and squalor.

At the same time, the concept of privacy is frequently used to deny constitutional remedies for the most flagrant abuses of personal rights. Private power is permitted to do what public power cannot. For the victim of violence and unconscionable exploitation, it makes little difference if the violator of his or her rights wears an official uniform or not. What matters is if there should be a remedy against avoidable tyranny.

Constitutionalism in its true sense abhors a vacuum. Constitutional rights do not stop at the front door. Nor are they barred by the factory gate. Nor are they excluded by the farm fence. Constitutionalism may in the first instance be concerned with abuses of power by the government. Yet it cannot be exhausted simply by the notion of limits on the power of government.

Just because for certain historical reasons constitutional rights and civil rights in the United States emerged as two different concepts, it does not mean that they should be put on separate tracks elsewhere. Constitutionalism in its broad dimension deals with securing the fundamental rights and dignity of all. It recognizes that each and every member of the community has the status of human being with the right to life, liberty and the pursuit of happiness.

It declares that no one should live in terror or be made to feel worthless, that no one should be victimized in a way that violates his or her fundamental dignity; not by a husband or by an employer or by a gangleader or by a government official. Similarly, no one should be denied access to enjoyment of fundamental rights to education, employment, accommodation and recreation on grounds of race or gender or other irrelevant characteristic. It would be bitter indeed if through the doctrine of privacy the new constitution came to protect rather than eliminate discrimination.

There are areas where the constitutional right to privacy would be stronger than claims to non-discrimination. Thus, however unjust and illogical many of us might feel it to be, many religious denominations reserve certain offices to men. This would be a matter for the members of the religious organization themselves to debate and change if necessary, there could be no question whatever of the courts being called upon to declare that women should be ordained as priests, bishops, rabbis or imams.

Similarly, persons must be free to decide whom they want as friends or lovers or dinner companions or house guests or spouses. However bigoted people might be in their preferences, the law will not interfere. Subject to reasonable limitations such as that of age, the law can neither compel nor prohibit free exercise of choice in these respects.

A third source of confusion in the constitutional debate is over what is negotiable and what is non-negotiable.

You cannot negotiate human rights.

If by their nature human rights are inalienable, then by the same token they must be non-negotiable. What you negotiate is not their essential content, but how to express them.

You discover them, distil them out of universal human experience, articulate them, find the best words in which to formulate them. Yet you do not bargain over them. There is no give and take, no compromise, no trading in fundamental rights. You seek flexible and efficacious means of realizing them. You acknowledge the concrete situations in which they become problematic. You realize that just as human beings develop and their societies change, so do their concepts of rights evolve.

You appreciate that rights collide with each other and need harmonization on the basis of proportionality. Yet you do not broker them. Rights are for everybody. They are indivisible. They are not on the market.

In particular, you do not trade what some have called first generation rights for First World communities against what is referred to as third generation rights for Third World people. We are all South Africans. We all want to be free to speak our minds, to vote, to move without hindrance. It is a question of who we are in the world, of worth, of dignity, of status.

Equally, we all desire health and education and somewhere decent to live and education and reward for our efforts. Our concrete hopes might be influenced by the real possibilities that await us, but the essence of our expectations is the same. It is this commonality of values and aspirations that makes it possible for us all to live together under one constitution.