The Democratic South Africa

The Making of the Constitution, the Principle of Ubuntu and the Interpretation of the Constitution by the Constitutional Court

Interview with Albert Louis »Albie« Sachs

*Albert Louis »Albie« Sachs (*1935 in Südafrika) hatte sich schon als Student gegen ungerechte Apartheidsgesetze engagiert. Ab 1949 verteidigte er als Rechtsanwalt in Kapstadt Gegner der Apartheid. Schon 1963 wurde er wegen seiner Aktivitäten im Widerstand verhaftet, anschließend gebannt und wieder ohne Prozess inhaftiert. 1966 emigrierte er nach England, wo er nach Promotion an der Universität Southampton lehrte. 1977 kehrte er nach Afrika zurück: in Mosambik trat er eine Professur an. In den folgenden Jahren arbeitete Sachs eng mit Oliver Tambo in der Befreiungsbewegung ANC zusammen. Ein Attentat südafrikanischer staatlicher Sicherheitskräfte in Maputo überlebte er schwer verletzt – er verlor einen Arm und das Augenlicht auf einem Auge. Während seiner Genesung erarbeitete er mit Mitstreitern des ANC Grundlagen für eine Verfassung eines befreiten Südafrika. 1990, nach Legalisierung des ANC und Freilassung Nelson Mandelas, kehrte er nach Südafrika zurück und beeinflusste wesentlich den Entwurf der Verfassung. Insbesondere die Formulierung der Grundrechte, der Bill of Rights geht auf ihn zurück. Bis 2009 war er als Richter am neu geschaffenen Verfassungsgericht aktiv, dessen beeindruckende Kunstausstellung er neben seiner richterlichen Tätigkeit aufbaute. Er ist Autor zahlreicher Bücher, von denen »The Strange Alchemy of Life and Law« 2010 ausgezeichnet wurde. Neben seiner persönlichen Entwicklung erörtert er zahlreiche verfassungsrechtliche Fragen anhand von Fällen des Verfassungsgerichts.*
Mit uns sprach er über die Entwicklung der Verfassung, das Verfahren der Verfassungsgebung in zwei Stufen, über Anregungen aus anderen Ländern, über das Konzept Ubuntu – des Verbundenseins aller Menschen– über die Bedeutung verschiedener Rechtsquellen wie Common Law und auch Gewohnheitsrecht der traditionellen Einwohner und seine Auslegung als lebendes sich entwickelndes Recht, um es Erfordernissen einer modernen Gesellschaft anzupassen.

Unser Interview veröffentlichen wir in der Originalsprache. Eine deutsche Übersetzung findet sich auf unserer Homepage www.betrifftjustiz.de.

***BJ:** You are one of the fathers of the South African constitution. In 1994, you did not just copy a constitution of some other nation because you had a very special situation – can you explain please?*

Sachs: I was one of many fathers and mothers of the Constitution. We even had a baby being breast-fed at one important session! The ANC negotiating team could not have been more diverse. We knew that the Apartheid constitution was terrible. It was a legal document; the basic law of South Africa, it was overtly racist, expressly undemocratic and contained no system of fundamental rights. How could you have fundamental rights in an overtly racist society – even conceptually that was not possible. It picked up on the power and sovereignty of parliament and related that to the instruments of a racist state. We couldn't amend that constitution, we couldn't qualify it or add to it – we had to destroy it completely. We had to start right from the beginning, with a clean slate. And so remarkable was our process that in the end it was the racist Parliament itself, from which all black Africa people were excluded that adopted the text of the interim Constitution that extinguished itself.

We had to imagine our new constitutional order, and before we got to the writing of the text of the constitution we had one major battle – the imagery that we used is interesting: we called it the battle of Cuito Cuanavale. That was a battle in An-

gola in 1988, where the white racist army of South Africa engaged with and had to retreat from Angolan and Cuban troops in Africa. That battle had a decisive influence on creating the independence of Namibia, sustaining the independence of Angola and ultimately achieving freedom in South Africa. There is an Argentine professor whose name I have forgotten who speaks about the central drama of every constitution-making process – I found it a very powerful and meaningful phrase. Only once we had resolved that central drama could we develop the structures and slot in the details. And even before we could reach the central drama at the negotiating table in South Africa, we in the ANC in exile, underground and in prison, had to make a fundamental political option: should we aim for people's power – along the lines of the People's Republic of Mozambique, the People's Republic of Angola, Cuba, China and other countries where the constitution consecrated the rule of a leading revolutionary party? That was the one type. Or should we go for a classical constitution like that of the United States of America, where the constitution is seen as there basically to contain and restrain public power? Or should we opt for a third model, what we called a post-dictatorship constitution? This model, taken from Portugal and Spain after fascism, embodied both pluralism and transformation: it allowed for an open society, it allowed for multi-party contestation, it embraced fundamental rights for all the people. But fundamental rights were not to be seen as mechanisms for maintaining the status quo, but rather as instruments for empowering the marginalized, the oppressed, the people who had been victimized by apartheid. We in the ANC decided to adopt the third model: it meant neither people's power, nor a constitution limiting the power of government, but a constitution that would come after dictatorship, after oppression, that would defend basic rights of all and promote transformation and change. That in fact was to become the main thrust of our constitution.

But the central drama was of another order. It was over whether we should base our constitution on power-sharing between racial groups, as the regime wanted, or a non-racial democracy with majority rule and a Bill of Rights, as the ANC fought for. We battled for years on this question – not an easy task. We had breakdowns, the negotiations stopped, we had rolling mass action with hundreds of thousands of people going out into the streets supporting the ANC positions. And eventually what was basically an ANC position was accepted by the then government, both in terms of the process to be followed to get a legitimate constitution and in terms of the core content it would have.

Albie Sachs *Foto: Ram Eisenberg CC BY-SA 3.0*

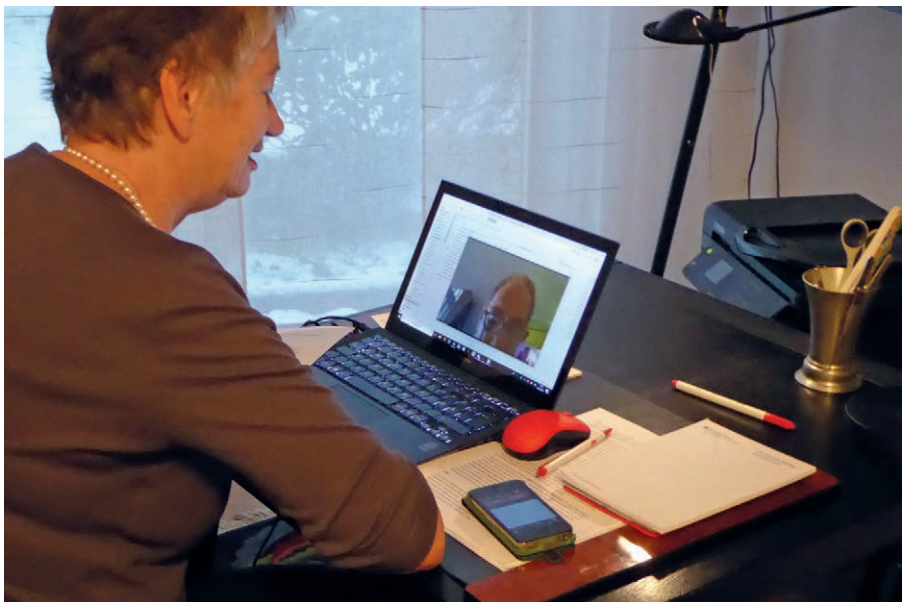
BJ: *Are you saying that the interim constitution, the first constitution for the new South Africa, was more or less what you had developed beforehand as the model constitution within the ANC?*

Sachs: What the ANC developed was two things combined: the ANC wanted a constitutional assembly to draw up the constitution, elected by the people. For the first time all South Africans would have the opportunity to vote. During the negotiations with the South African Apartheid government, our terminology changed. In the ANC we used to speak about »the enemy«, then we said »the regime« – a little softer. Then it became »the government«, and as things advanced we said »the other side«. We never took a decision on terminology, it just happened. At the beginning, what the then »enemy« wanted was power sharing between the racial groups, each choosing their own leadership. We would have had three presidents who would have had to rule by consensus and in rotation. It would have been a total disaster. Mandela, de Klerk and Buthelezi in 6 months rotation. They argued that it was the only way to prevent racial domination of one group over another. We rejected that idea, allegedly based on principles of consociational democracy, totally.

The central drama of our constitution-making process, then, came from our insistence that we create a non-racial democratic constitutional order. And if the whites were worried about what would happen to them under black majority rule, the protection wouldn't come to them because they were white, but because they were human beings. All human beings, black or white, were entitled to protection of their basic rights. Language, cultural and religious rights would be fully protected as such, but not constitute the foundations of the new state structure.

The ANC also decided that we should not ourselves write a constitution and then put it to the people – that would be a denial of constitutionalism from the

beginning. We wanted a constituent assembly elected by the people to draft the new constitution. The regime said: No, we will be overwhelmed and dominated in such an assembly, and our rights will not be protected. We ourselves must draft the constitution here and now at the negotiating table.... the negotiating bodies were a mixture of about 25 or 26 state governments in the Apartheid South Africa System and political parties, including liberation movement parties. The regime wanted that body, we called it CODESA – Convention for a Democratic South Africa – to draft the constitution and then put it to a referendum. We said no, that would be denying sovereignty to the people at the moment of liberation: a self-appointed body creating a constitution, and telling the people, take it or leave it.



Andrea Kaminski beim Skype-Interview mit »Albie« Sachs *Foto: Claus Kaminski*

So we developed a notion of a two-stage process of constitution making. For the first time in South Africa black people would have the vote for parliament. This new parliament would both pass laws and draft the constitution. The protection against future abuse of minorities would come through the negotiating parties agreeing in advance on principles that the new parliament would have to respect when drafting the new constitution. So don't worry, Mr. de Klerk, there will be the rule of law. If you want to insure there will be equality for everybody, and no discrimination against whites in the future, it will be there. You want to be sure your language will be protected, your religion will be protected, it will be there. We can agree to all this in advance. And we can agree to have fundamental rights. We in the ANC thought that four or five basic principles would be enough – rule of law, separation of powers, fundamental rights ...we ended up with 34. Some of them had sub-clauses, and we dealt with a whole range of different questions – like for example devolution. And we found that we got a lot from Germany in terms of co-operative governance of the different spheres of government. We negotiated hard over the terms of the 34 principles that had to be respected in the final constitution. We also agreed that we would have voting by proportional representation so that even the smallest groups would be represented and participate in the national project. We didn't have a threshold. We wanted even tiny groups to be in the constitutional assembly so that they couldn't say this is not our constitution. We also required a 2/3 majority in support of the text and full compliance with the 34 principles.

Who would decide if the 34 principles had been complied with? A constitutional court was necessary. The constitutional court would insure that the provisions of the interim constitution concerning elections, the structures of government and the exercise of fundamental rights would be respected. But in addition, the constitutional court, the highest court in the country, would have the special task of deciding if the constitution was constitutional!

Parliament was given two years to draft the constitution. We were lucky that 1996 was a leap year, so there was one extra day in the year. People always work to the last minute, and it was actually late in the afternoon of the very last day of the two years that they agreed. They agreed with over 80 % majority to what was one of the most progressive, forward-looking constitutions in the world. The text was in fact sent to the Constitutional Court. After hearing objections from the public over ten days we eventually decided that although overwhelmingly it did comply with the 34 principles, in nine respects it did not. The result was that we declared the constitution to be unconstitutional. It was sent back to Parliament sitting as the Constitutional Assembly, the necessary corrections were made and Nelson Mandela signed it into law on December 10, 1996, at a ceremony at Sharpeville , the site of a terrible massacre some decades before.

It's a rather amazing constitution. It includes non-discrimination on grounds of sexual orientation. It has got environmental rights. It contains very strong workers' rights, because the workers and the trade unions played a very important role in overthrowing Apartheid. It has got very strong children's rights, and rights for women probably more expansive than in any other constitution in the world. For example the general definition of freedom contains rights over reproduction as well as the right not to be subjected to violence from the state or from private persons.

It is a constitution with a powerful, resonant preamble. It speaks about the injustices of the past and the need for change. It is a constitution for transformation. You see that in the text, especially in the preamble. You'll see it in the foundational principles. I think in the German constitution the one foundational principle is human dignity, which is very important for us. But our foundational principles include achieving a non-racial, non-sexist society. Up to now, I believe, it is the only constitution in the world that has non-sexism as a foundational principle.

I wish I could say in our society the principle was operating all the time. Yet even as a standard, as a point of reference, it is very powerful. And it speaks of the achievement of non-racism and non-sexism. It says in effect: »we are living in an unjust society, and we must make it just, and that means we must take measures to make it just but also we must do so in a way that is just«. So the substantive requirement of showing respect for the people and for human dignity applies is coupled with the procedural responsibility to achieve these objectives in a fair manner.

We have the right to just administrative action – that is now a constitutional right. Also the right to information. There are many other features like that that make it an advanced comprehensive constitution.

BJ: *Did you draw anything from other countries' constitutions?*

Sachs: First of all, we made our constitution ourselves. We didn't have advisors, we didn't have counsellors. The only outsider we had was a Canadian who was an expert on plain English. I'm told his job was to shorten sentences and cut out technical legal terminology wherever possible, making sure all people could understand it. We benefitted very much. But we derived ideas from all continents. I would say from the USA we took the basic notion of separation of powers with an entrenched constitution and strong judicial review. But otherwise very little came from the USA. From Canada we took a lot from their charter of rights. The charter was brought in in 1982, and we were negotiating ten years later. They had a very fine supreme court, with some brilliant leadership from Chief Justice Dixon, supported by Justice Bertha Wilson. It's called the Dixon-Wilson court. Their creative, modern, intelligent outlook we found very very helpful. The way we modelled our bill of rights was similar to theirs, setting out the rights and not providing for individual qualifications but rather having a general limitations clause. When interpreting the limitations of rights provision in the charter, Canadian Justices turned towards proportionality which they took from Germany and used a lot for themselves – that became the structure of the bill of rights. Our bill of rights is much more comprehensive than theirs. It has social economic rights and, which is another strong feature of our constitution, justiciable rights that include the right to housing, to education, to health, to food, water and social welfare. Also our gender rights are textually much stronger than in Canada, and they don't have socio-economic rights at all.

From Germany we adopted the idea of having a constitutional court, something which wasn't known in Common Law countries. I should mention that I was very happy to hear recently from a member of the German constitutional court that in fact on all sorts of issues the first jurisprudence they look at is that of the South African constitutional court. Initially, under the interim constitution, our ordinary courts would not deal with constitutional matters, but would refer them to the constitutional court. We changed that in the final constitution. We had found the referral process to be very inconvenient, artificial, and we wanted all the courts to embrace constitutional values. We wanted all legislation to be interpreted in the light of the constitution. We wanted the common law to be developed in the light of the constitution. We wanted the whole judiciary to be infused with constitutional values. The constitutional court at the top would then have the last word on constitutional matters.

Another thing we got from Germany was the notion of cooperative governance. And with that went concurrent powers between the national and the provincial legislatures. I was actually in the University of Hannover, and Professor Hans-Peter Schneider solved one huge problem without realizing how important it was for us: when we asked him – and in that case it was the Friedrich Ebert Stiftung that had arranged for the constitutional committee of the ANC to travel to Germany – we went to the constitutional court, we met the judges there, and then we went to the University of Hannover to attend some seminars. And one of the first questions that we asked was: if there is a conflict between legislation of the national government and legislation of the regional states, which prevails? And Hans-Peter Schneider told us that there are just some matters reserved exclusively for the national and even fewer for the regional spheres of government, but mostly there are concurrent powers. And where there is a national interest involved, the national law prevails, and where the regional interest is dominant, that prevails. And then there are mechanisms including the use of the court in cases where there is a conflict. That was crucial for our breakthrough.

In our final constitution we also constructed our second chamber very much on the lines of your Bundesrat. Instead of having a directly elected senate, we choose a center for representation of the provinces. Our second chamber is now called the National Council of Provinces. And so in that sense we took 3 features of the German constitution structure: the constitutional court, which we went on to make more like the Canadian Supreme Court, the principle of cooperative governance instead of the competitive federalism which the United States has, and then thirdly the National Council of Provinces.

From India we got the Finance and Fiscal Commission. In a way it came about because one of our supporters fell in love in the Netherlands with a woman from India. He went to India out of curiosity about the constitution but also in order to meet his beloved. Meanwhile within the ANC we were thinking about how we would organize the country's finances, and how to get redistribution. In Germany your model is mathematical, and I think basically the main revenue is collected locally and pooled nationally and then redistributed according to a formula. That wouldn't work in South Africa. Partly because we are not so precise with numbers. But we needed a far more dramatic redistribution, because the whole way our economy had been developed had been for poor labour reserves to serve the cities and the towns and mines and so on. So we needed a commission that would take account not only of the different levels of income in the different parts of the country but the way our whole country had been structured to provide for cheap labour. We found the Indian Finance and Fiscal Commission model to be attractive. It is not elected but chosen in quite a careful way, it is not a decision making body but it devises policy for government in terms of transfers to insure that the rich of

Justice Albie Sachs delivering the judgment in Fourie, the Same Sex Marriages case, Foto aus dem Buch The Strange Alchemy of Life and Law. Abdruck mit Erlaubnis der Gerichtsverwaltung.

the country don't automatically become richer while the poor stay poor forever.

And finally from Namibia – the former German colony with some interesting litigation going on right now about the conduct of the German colonizers and troops – which became independent just before democracy in South Africa – from Namibia we got the non-racial democracy idea. And that was the most important element. In a country in Africa that suffered discrimination based on race in a very overt way, the Namibian approach was not to try and find a balance between the races, not to entrench ethnicity, but to have a completely non-racial, non-ethnic, non-religious, non-faith-based constitution that protected faith, religion, language but didn't consolidate the structures of power around those notions. And I mention that because it is true that we got much from America, from Canada, from Germany, from India and from Namibia – I like to show the whole world contributed. We drew on examples from the whole world. But I like to say the Indian experience was particularly rich for us. They have constituted the same lead. It wasn't a constitution drafted in London by the British with some top Indian lawyers. It was drafted by the Indian people in their own assembly, dealing with their own issues. And the Indian constitution has stood up remarkably well for all the problems of the country: It is a very robust democracy in that sense. And so the most important notion we took from India related to process, the two stage process of constitution making; but also we got the Finance and Fiscal Commission idea from that country.

We also created the very interesting chapter 9 in our constitution: It is called the Institutions for the Protection of Democracy. I don't think any other constitution of the world has that.

The Independent Election Commission is a body of supervisors for protecting the right to vote. Secondly we have the Judicial Service Commission that basically chooses the judges. It has got parliamentary representation and the president has certain power in terms of choosing the chief justice but always with reference to the Judicial Service Commission.

BJ: *And who chooses the members of the commission?*

Sachs: Well, it is a broadly based body. The legal profession chooses four members, the law teachers choose one, the president appoints four people who are experts in the law. Happily Mandela appointed four wonderful people – and they must be clever because they chose me. That's to prove they are brilliant. The chief justice sits on it and presides. And parliament sends 10 members of proportional representation. By and large it has worked very well. The judiciary we are having now is playing an extremely important role in our society, particularly in dealing with issues of corruption, of failure of top public officials including the president to function according to the constitution. And parliament: it held parliament to its duty to control the president.

But let me continue about the institutions for the protection of democracy. The Commission for Human Rights is a broadcasting control commission, the Commission for Gender Equality and the Commission for Language, Culture and Religious Rights are all protected in the constitution. They are chosen by parliament after public processes, and the composition cannot be changed except by very high majorities. It has been vital for us. The two most important ones have been the Judicial Service Commission, itself being independent in the choice of judges and the Independent Electoral Commission. And the auditor general is protected. This is another very important element of our constitutional order.

You will also find very interesting the section on security services. Because the idea of »just obeying orders« is not accepted. It is very clear that all people exercising security functions are bound by constitutional values and principles. And some element of control by parliament is given over intelligence services. Even the military is very much subject to the constitutional values and principles. And when it came to the question of soldier's trade unions – one of the first issues that came to our court – we held that soldiers were workers, employees, entitled to labour rights, but not to go on strike, but to have their own union representatives to be able to negotiate over terms and conditions of employment. The right to strike is protected in the constitution, but we held that it would be a reasonable limitation to deny them the right to strike. So soldiers cannot go on strike, but they can petition, claim, negotiate for worker's rights,

and that is quite important. I remember myself debating with my colleagues and saying to myself that in the liberation struggle we inside the ANC saw our soldiers as thinking soldiers. They were thinking first and then carrying guns second. The regime had had it just the other way round: they had had to obey orders. The traditional ideology applied there. Whereas our constitution assumes that our soldiers don't leave their brains and their empathy behind when they become soldiers, and the constitution requires them to think, therefore they are soldiers.

BJ: *I would like to get some more information about the Constitutional Court. You were saying that it changed considerably…*

Sachs: We ended up having 11 judges, which is quite a big court. We all hear all matters. A quorum is eight. We take decisions by majority, and each judge expresses his or her opinion. We frequently write either dissents or concurring judgements for other reasons. I think that of the first 11 judges we had six white men, one white woman, one black woman, two black men and one Indian man. The six white men included chief justice Arthur Chaskalson who had been a lawyer, very brilliant. He had left private practise to set up a legal resources center for a public interest litigation, which is still going strong today in South Africa. I myself had been practising at the bar in Cape Town, became a law teacher in England and Mozambique and then with the title of Professor had worked full time on the constitution. Catherine O'Regan and Yvonne Mokgoro were law teachers. That was new in South Africa, we didn't have the tradition of academics being appointed as judges. And all of us were totally in favor of the new constitution, we were thrilled by it. So we were not broadly representative of the legal profession as a whole. We were very much avant-garde. Some of us had been directly involved in the struggle, others had worked only as lawyers, some had been in the resistance like myself. Others had supported the resistance but only in their capacity as lawyers. And others had just been progressive-minded judges, sensitive to the importance of the issues of race and gender. And when it came to issues like capital punishment, we were unanimously against it. Our very first case was on the constitutionality of capital punishment.

Quelle: www.pixabay.de CC

BJ: *I was wondering why the abolishment of capital punishment is not expressively stated in the constitution like we have it in Germany, if the decision against it was so clear?*

Sachs: Because during negotiations we couldn't agree on that. The ANC wanted to abolish. The old regime claiming to represent white western civilisation, couldn't imagine a country that would not execute its citizens. So we decided to leave it for the constitutional court to decide. In the constitutional court we never discussed our cases before the hearing, so we didn't know where colleagues stood, but when after the hearing we withdrew to the conference table, we found out very quickly that we were unanimous in finding capital punishment to be unconstitutional, even though our reasons differed.

This is a feature of our court, we work through every case, going round and round the table in open discussion. We had law clerks for one year, usually just out of university. It's great training for them. In my case they played a very important role: they had to find my glasses, organize my papers, they had to remind me what day of the week it was and, yes, also do a bit of research. I was on the court for 15 years, and maybe only in the last one or two years did I permit some of them to help with actually writing a judgement. I found even when dealing with the facts I had my own way of expressing myself. Overall, however, the law clerks were great. Most were South Africans, but others came from all over the world. One of most helpful clerks came from Berlin, Felix Oelkers. Some of that early generation have now become judges themselves in South Africa, one an Acting Justice on the Constitutional Court. I hope the Court continues with the practice of workshop, workshop, workshop.

Chief Justice Chaskalson produced a magnificent judgement on capital punishment – that was the first judgement he had ever written, he had never been a judge before. And it's a classic. And basically, he introduced proportionality into our jurisprudence. I had learned about proportionality from Professor Dieter Grimm even before I became a judge. It was a completely new notion for us. We knew about proportionate force in self defense. But that was limited to one aspect of criminal law. And now proportionality rapidly became central to our court's jurisprudence. On capital punishment the court used proportionality as the foundation, basically saying that capital punishment is exceptionally

drastic in its operation, it's irreversible if there's a mistake, it is inevitably caught up in racial stereotypes and so on, and in the absence of proof that it is more effective as a deterrent than the threat of a long term imprisonment, it fails to pass the test of proportionality. And that became the conceptual basis for the court's decision. I wasn't happy with that. I agreed with the outcome, but that was not my primary reasoning. Even if there was proof that capital punishment was a uniquely powerful deterrent against uniquely horrid criminality, I wanted to say that our Constitution forbade it simply because it was inhuman. The state should not kill any human being in cold blood. As one of my colleagues on the Bench said, imposing the death sentence does not punish the crime, it repeats the crime. Another colleague pointed out that there are no degrees of death. I agreed; to my mind proportionality did not enter the matter when the subject of the right was extinguished. So the real foundation of my decision was not lack of proof of deterrence, but on upholding a constitutional reverence for human dignity and life, a notion that has been prominent in German thinking of the post-Hitler period.

So I wanted to write a concurrence explaining my position, and discovered that all my colleagues wanted to write concurrent opinions themselves. Now more than two decades later I still feel the emotion of the issues. The result was that ten concurrences were written to the principal judgment. One very important theme that came through was that of Ubuntu. It was my colleague Yvonne Mokgoro who drew on it most extensively. And I think six of our judgements referred to it. Ubuntu is an African concept of human interdependence and the responsibility we have for each other: I am a person because you are a person, I cannot separate my humanity from acknowledging yours, I enrich my humanity by respecting your humanity. It is so different from the pure libertarian view of I have a right to be left alone. It is saying we are all interdependent. And Ubuntu has gone beyond being part of the philosophical foundation for denouncing capital punishment to influence many other areas of the jurisprudence of our courts in South Africa.

BJ: *This brings the Truth and Reconciliation Commission to my mind: I imagine Ubuntu playing a big role in the philosophy behind it?*

Sachs: Very much so. The interim Constitution expressly declared that we should deal with the crimes of the past, the unjust violations of rights in the past, not in a spirit of vengeance and retaliation, but in a spirit of reconciliation and Ubuntu. It was not an invention of the constitution drafters, but a philosophical theme strongly embedded in African life. For me, its importance lay in finding human roots for our new constitutional order not in imported and often imposed colonial concepts and structures, but in profound African concepts of human solidarity. At one stage when I went to the USA I would find many of my colleagues there fighting with each other rather viciously: communitarians on the one side versus the libertarians on the other.

And I would agree with the criticisms that each side had of the other. The libertarians said that the communitarian view would suppress individuality, autonomy, freedom and choice. And there is no doubt that collectivist notions had long been used in countries calling themselves socialist to suppress freedom of speech and association and so on. But at the same time I agreed to the communitarian challenge that the libertarian approach that looked at individuals as atoms existing on their own in competition with each other. This was unreal. We live in our communities, we live in our neighbourhood, our families, our faith-communities, our unions. So, I introduced into the American debate the notion of dignitarianism, saying that dignity presupposes autonomy, respect for individual choice, but it also presupposes community, because you can't express your dignity just on your own. And the dignitarian approach fits in very well with the notion of Ubuntu in South Africa.

This has been quite important in terms of things like hate speech. It has to do with interdependence. We wouldn't tolerate or allow the kind of speech that United States courts might allow.

BJ: *I see that you explicitly exclude hate speech in your constitution from the protection of free speech. We have some rather similar exception in Germany concerning NS propaganda.*

Sachs: By its nature this is a difficult topic. Nowadays hate speech is popping up in the social media. Our point of departure generally has been that there has been so much pain in this country based on racism, speaking about black people as monkeys is completely intolerable and should be repressed, because it could blow the country up. It attacks human dignity, it is not just being offensive.

BJ: *In the context of your Traditional Courts Bill I read some critic by Aninka Claassens that »customary values and practices that actually govern the majority of South Africans« were not enough represented in the law of the new South Africa. Does your constitution accept customary law?*

Sachs: On the contrary, we expressly included customary law as an original source of law, with a legal status as strong as the law received from England or from the Netherlands. Aninka Claassens, who heads one of our most brilliant research institutions, has in fact given full support to the manner in which the Constitutional Court has developed the notion of living customary law. So for example we had a case of how to apply customary law after a man had died who had been living in a small house with a woman and their two daughters. To their shock and dismay, the man's cousin came and took and sold the house to pay for the funeral expenses. The cousin relied on the fact that according to customary law, as the nearest male relative it was he who inherited the property and so he could do with it what he pleased. The matter went to court and eventually ended up before us. We held that customary law did not stand still; that the rules as written down in Apartheid/colonial times by racist magistrates sometimes in collusion with autocratic traditional leaders had to be changed to correspond to the new ways in which African people lived. Women today earned their own income, some even became judges; property was different; families were different; values were different. The vitality and meaningfulness of customary law depended on its capacity to evolve in keeping with the changing

Constitutional Court typeface designed by Garth Walker, featured on the facade of the court building.

nature of African society. The constitution required the courts to develop customary law as well as the common law to bring it in line with the Bill of Rights. So just as we had in an earlier case declared the common law crime of sodomy to be unconstitutional, so we held that the male primogeniture rule of customary law was unconstitutional. We as judges were not going to re-write inheritance laws for people living under customary law, but would leave it to Parliament to do so through appropriate constitutionally compliant legislation. I will conclude with a very interesting case of a traditional rural community that wanted a woman to become their traditional leader. The royal family agreed. They called an assembly of the people who also agreed. But just before he died, the incumbent traditional leader changed his mind and said no, his son must take over. And then when the state formally recognised the woman as the leader, the son went to court. The High Court, and after it, the Supreme Court of Appeal, accepted his argument that, firstly, under customary law you are born a traditional leader and cannot be elected as one, and secondly, that customary law followed the principle of primogeniture in determining who the new incumbent should be. The matter finally reached our court. At the hearing the court chamber was packed with women who had come sleeping in a bus, and then on arrival they would sleep in the bus, had filled it from 10 to 11.15 am when we adjourned for a tea break. Then from 11.30 am to 1 pm women from a second bus occupied the public seating space. It was wonderful for us judges to see them there. And at the end of the day the chief justice – Pius Langa – spoke to them in their language thanking them very much for sitting so patiently, listening to proceedings that were not in their language and often very technical, and for listening with great dignity. I felt that that was the kind of court that I wanted to be judge in, where the community could come, listen intently to the arguments, and be shown deep respect by the Chief Justice. The judgment that we delivered several weeks later emphasised the living nature of customary law. We held unanimously that if the community itself wanted to choose a woman to be their traditional leader, then customary law must evolve to implement their wishes.

The tension between the old rules of customary law and the non-sexism principle in our new constitution was resolved not through using the constitution as a weapon to hit customary law on the head, but through developing the notion of living customary law. Only in this way could customary law escape ossification and remain in touch with the people. Aninka in fact was very concerned about the way that the Bill before Parliament proposed to establish traditional courts. She felt that instead of embodying the principles of living customary law, they would revert to patriarchal traditions and affirm feudal type power for a few dominant families. So Aninka has expressed in strong opposition to the traditional courts bills. The bill is now before parliament again. It will be interesting to see if the change of the leadership of the ANC from Jacob Zuma to Cyril Ramaphosa will have any effect on the orientation of the governing party in parliament in relation to issues like this. ■

Das Gespräch führte Andrea Kaminski am 02.02.2018 via Skype.

Siehe auch:

Ralph Zulman, Zurück zur Stammesjustiz? – Das Traditional Courts Gesetz Südafrikas, BJ 2013 S. 122 ff.
Sandile Ngcobo, Vergebung und Recht: Der Aufbau des neuen Südafrika, BJ 2016, S. 129 ff.