

**LECTURE DELIVERED BY JUSTICE ALBIE SACHS TO THE ADMINISTRATIVE AND  
CONSTITUTIONAL LAW BAR ASSOCIATION ON THE 11<sup>TH</sup> MARCH 2003 AT  
A JOINT MEETING WITH UNIVERSITY COLLEGE LONDON**

Albie Sachs, Judge of the Supreme Court of South Africa stated as follows:

On the 14<sup>th</sup> February 1995 Nelson Mandela got to his feet and spoke about the last time that he had stood up in Court which contrasted starkly to his duties now in inaugurating the South African First Constitutional Court.

The Constitutional Court was appointed by Nelson Mandela as President and he himself had been appointed by Parliament. We had great affection for him and his leadership however 6 months later we struck down 2 proclamations of his! It was at this stage that constitutional democracy was clearly and irreversibly established in South Africa.

Justice Sachs then spoke of examples where the Constitutional Court had considered challenges to it.

## **Mandela and the Elections**

This challenge was brought by the opposition and the Western Cape Provincial Government. The key issue was whether Parliament, in the exercise of authority pursuant to the Constitution, could grant the President power to legislate for the holding of elections. In particular, such power would enable him to revoke old legislation from South Africa's racist past regarding elections. The South African Constitutional Court held that Parliament did not have the authority to entrust to the President its own legislative power. Parliament could pass laws giving authority to administrative officials regarding details to be carried out. However the basic law itself must be adopted by Parliament itself. This was the doctrine of "manner and form".

Two of the Judges (including myself) took a slightly different line but reached the same conclusion. The Court held that there were basic features of the Constitutional Order that were so key to that Constitution Order that Parliament could not exercise legislative authority. The doctrine of “manner and form” is now law in South Africa. The opponents of this were surprised at the objectivity of the Court. What was Mandela’s response? Within hours he went onto national television to state that he had adopted the proclamations on legal advice which he now realised had been wrong and that he now respected the decision of the Constitutional Court. We regarded this as a gracious and wholehearted acknowledgment by him of the supremacy of the Constitution. By contrast considering the UK I find it astonishing here the cavalier way in which some people seem to deal with judgments made by the judiciary. I regard this as showing no respect for the rule of law. The outcome of our decision in South Africa delayed the elections process but it was our constitutional duty.

## **Mandela the Merciful**

This case referred to an Act issued by President Mandela. It was issued in a new era of hopefulness, whereby he directed the release of prisoners under a certain age, those certified as disabled and the mothers of children under age 12 (unless these individuals were guilty of certain acts).

A father of a child under 12 years old brought a case claiming that this was sexual discrimination against him in that the Act did not refer to fathers of children under 12 years of age. The case came to us in the Constitutional Court on appeal. We had to consider whether we could intervene regarding the President’s act of mercy? We looked to the case law of other jurisdictions, in particular the USA and saw that this was an area where the Courts are reluctant to intervene. We held that the Bill of Rights operates regarding all conduct by public officials and that the Court would refrain from imposing its view as to the merits. However, if the official acted in a way which was incompatible

with the Bill of Rights, the Constitutional Court would intervene. We carried the trend of there being no areas outside the scope of the Constitution to its logical conclusion and held that the President was not exempt from scrutiny.

## **Our new building**

The new building on which our Constitutional Court stands is on the site of an old prison. This has been deliberately chosen to manifest the way in which negativity has been turned to positivity in South Africa. In his address, Nelson Mandela joked that he was unhappy to be on the site of an old prison and could not wait to leave. He had spent long periods in places like this and was not sure that the keys would not be lost!

### The case regarding Mandela testifying against the Rugby Union (The Safu Case)

In this case, the President of the Rugby Union asserted bias before us in the Constitutional Court especially as five members of the Court had such a close relationship with President Mandela. One of the members of the Constitutional Court in particular had defended President Mandela in his trials. This case raised the wider question as to whether the link of resistance to apartheid should affect whether the Constitutional Court was seen to be impartial? It also raised the issue of whether one could be a Judge in one's own cause. We in the Court considered the international precedents in this arena. We felt that there was nothing on the facts of our case that came close to bias and the Court therefore rejected the application. The case involved judicial review of public power and a new way of looking at judicial review. Under apartheid, administrative law had given some Judges some scope for interfering with outrageous conduct of the government (usually on procedural grounds) therefore vigilance was an important factor to counteract apartheid. However now, under democracy we needed to be mindful of procedural and substantive rights. We have a range of controls established by the Constitution to prevent abuse including the power of the Auditor General. In the Safu case, we held that the President was not above the law but should not be brought to Court. In other words, as regards him testifying, the manner of calling for testimony

must be concomitant with the dignity of the office he held. In other words, a subpoena for the President would be inappropriate.

## **Mandela in Error**

This case concerned a pharmaceuticals law which had been passed, contrary to opposition, to try to bring down the price of antiviral drugs. The President had designated a date on which the law was to come into force. He found out subsequently that he had been in error in making this legislation since the new apparatus had not yet been put into place and therefore the law would have been inaccurate from its very outset. The President approached the Constitutional Court seeking to revoke his signature. He wished for the law to be treated as not being a law. On the facts all the parties wished this law to be revoked however the Constitution did not allow it. The Constitutional Court considered the doctrine of necessity as to whether this would entail us to suspend the law. In my opinion public policy is a wonderful steed, however necessity is a very dangerous horse. In particular who is to determine what is necessary? On the facts, therefore, the Constitutional Court determined that the law was irrational. This must be determined objectively. It is fundamental to legislation that there is a minimum level of rationality otherwise law is not a law but simply a piece of paper. On the facts therefore we held that the law was null and void because it was irrational.

## **Mandela in Doubt**

This case concerned the liquor bill. The South African breweries had extensive control over the sale of liquor and the government wished to open up trade especially to black entrepreneurs. The Liquor Bill set out the principles regarding the granting of licences and the government of the Western Cape objected to the Bill. This was an area of law over which there was significant provincial control. President Mandela had doubts and

felt that there was an undue interference by virtue of the Liquor Bill, with the autonomy of the Western Cape Province. He therefore refused to sign the Bill. He referred the case to the Constitutional Court.

The Constitutional Court held he was right to have reservations. We held that the Bill was unconstitutional and over directive from a national government point of view as regards the granting of licences in the Provinces. Our Court has been established to interpret the Constitution. I should state that our present President is also impeccable as regards his respect for the Constitutional Court.

By conclusion, I wish to remind you all that our new building is such a source of delight to us. Nothing could more strongly underline the significance of public power than placing the Court on the site of such a horrible prison. It shows our wonderful traditions of resistance and the fact of hope surviving.

I would like to stress the importance of law in the minds of freedom fighters. Our new Court building must convey this ambience.

Our current Chief Justice has previously left a lucrative practice to work as a lawyer taking on civil rights cases.

Justice Sachs answered numerous questions including regarding the Truth and Reconciliation Commission. He commended the excellent report of that Commission to the audience. He spoke about the difference between logical truth, microscopic truth and experiential truth.

Justice Sachs also explained that he was in the process of dictating chapters about his travels for a book.

Owen Davies QC commended the website of the South African Constitutional Court to members of ALBA and UCL.

The website is <http://www.concourt.gov.za/>