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# The Creation of South Africa's Constitution: Introduction

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# THE CREATION OF SOUTH AFRICA'S CONSTITUTION\*

## INTRODUCTION

STEPHEN J. ELLMANN\*\*

It is a great pleasure to introduce Judge Albie Sachs and to welcome him here on behalf of New York Law School, New York Law School's Center for International Law, and myself.

Albie Sachs has had a life that has the feel of fiction and the stark reality of fact. In 1957, he began practicing in South Africa in the small field of civil rights law, a practice punctuated by periods of detention under the ever-growing emergency powers of the South African state. Those periods of detention produced, among other things, a book entitled *The Jail Diary of Albie Sachs*,<sup>1</sup> which, unlike most things lawyers write, was dramatized by the Royal Shakespeare Company and broadcast by the BBC. It also produced a case, *Rossouw v. Sachs*,<sup>2</sup> which in my opinion is one of the worst decisions of the "Appellate Division," which in the old South Africa was the nation's highest court. Judge Sachs was the "Sachs" of that case, a detainee under South Africa's repressive security powers, and he did not fare well at all in his litigation at the time.

In 1966, he left South Africa and went into exile for more than two decades. In exile, he played an important role in the anti-apartheid struggle waged by the African National Congress (ANC),<sup>3</sup> in legal education in Mozambique, and as a scholar. He wrote a book called *Justice In South Africa*,<sup>4</sup> which, as far as I know, is still the leading work

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\* This lecture by Justice Albie Sachs was held at New York Law School, New York, New York, in October 1996.

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1. ALBIE SACHS, *THE JAIL DIARY OF ALBIE SACHS* (1966).

2. *Rossouw v. Sachs*, 1964 (2) SA 551 (A). For discussion of this case, see STEPHEN ELLMANN, *IN A TIME OF TROUBLE: LAW AND LIBERTY IN SOUTH AFRICA'S STATE OF EMERGENCY* 50-51, 121 (1992).

3. Kenneth D. Kaunda, former President of Zambia, describes the role played by the ANC in African liberation:

The African National Congress (ANC) was founded in January 1912, as the South African Native National Congress (SANNC) . . . . The ANC is, without doubt, the oldest black nationalist movement on the continent. All nationalist movements in black Africa . . . were in one way or another inspired by the struggle for freedom which the ANC began in South Africa.

Kenneth D. Kaunda, *The First Shall Be the Last: The African National Congress and the Inkatha Freedom Party Dispute*, 37 ST. LOUIS U. L.J. 841, 843 (1993).

4. ALBIE SACHS, *JUSTICE IN SOUTH AFRICA* (1973).

on South African legal history even though it was written two decades ago. When author Sachs got to respond to the Court's treatment of litigant Sachs back in *Rossouw v. Sachs*, he mocked some of their more ridiculous observations.<sup>5</sup> This is an opportunity any of us would relish, though not one for which many of us would first endure detention without trial. Then he was very severely injured and nearly killed by a car bombing in 1988. Having survived that, he escaped the bitterness that might have befallen another victim of such violence, and instead became a leader in the ANC's and South Africa's process of thinking about what a post-apartheid constitution would have to say.

For a long time, the ANC, I think it is fair to say, was so far out of power that working out the provisions of a post-apartheid constitution was far from being one of their main concerns. However, by the late 1980s, that was no longer true. Planning had to begin and Judge Sachs played a major role in that planning, a role that was both creative and liberal. His creativity was apparent in his writing, in which he steadily resisted just borrowing from other countries' constitutions and insisted instead on deciding anew how rights might be protected.<sup>6</sup> As to his liberalism, I am not certain that Judge Sachs will welcome this label, and I don't mean that he has been a liberal in the sense that he adopted every detail of American constitutional law (even assuming all of our law deserves to be called "liberal"). What I do mean is that he embraced and pursued the fundamental concerns of American human rights protections and of comparable human rights systems around the world.

And finally, and this perhaps most uniquely, Judge Sachs's voice in these debates was humane. That is no small feat in South Africa, a country which by the late 1980s was about as profoundly divided as a country could be. The task of formulating a constitution that would govern a nation in which both oppressed and oppressors found a new home was a very delicate and difficult undertaking. One of the special things that Judge Sachs did was to repeatedly think about how everyone could be brought to live in the same, small geographic area, *together*.<sup>7</sup>

Judge Sachs's work in those years, and the work of many others as well, culminated in the first post-apartheid constitution, which still governs in South Africa.<sup>8</sup> It also resulted in the establishment of South Africa's

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5. See *id.* at 251-52.

6. See ALBIE SACHS, *PROTECTING HUMAN RIGHTS IN A NEW SOUTH AFRICA* (1990).

7. See, for example, his discussion of how to harmonize bitterly disputed "rights to the land," in *id.* at 104-38.

8. The Interim Constitution was still in force in 1996, when Judge Sachs spoke, but it has now been replaced by South Africa's final constitution, the Constitution of the Republic of South Africa, 1996.

first constitutional court, which interprets and applies that constitution and on which Judge Sachs is one of the eleven justices. His opinions there continue to reflect his independent and wide-ranging jurisprudential interests, as well as the same humanity I mentioned earlier. All of which make it a great pleasure to welcome Judge Albie Sachs to New York Law School.

