

The Future of Multiculturalism in South Africa: The vision of the Constitution

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If we did a paternity or maternity test on the South African Constitution, whose DNA do you think would come up? It's no one in this room, although there are people here who made a major contribution. Nor is it Nelson Mandela. The answer is: Oliver Tambo.

I recall a moment in March 1988 when I was walking to the microphone in a room in Lusaka about a tenth of the size of this one. My topic was a Bill of Rights in a democratic South Africa. And my heart was going boom, boom, boom.

Oliver Tambo had set up the ANC Constitutional Committee which had organised a workshop to discuss a document we had prepared, titled Constitutional Guidelines. For years our legal skills had been used to denounce apartheid. A typical paper I had written had shown how every single article in the Universal Declaration of Human Rights was being violated in South Africa (with one exception, I should add – try as I might, I couldn't show that apartheid denied rights to intellectual property!) Now we were moving our focus from what we wished to destroy, to what we were determined to build. It was thrilling to work

as part of a team with the quiet, thoughtful, principled and open-minded Oliver Tambo at the helm. My function at the workshop was to explain what a Bill of Rights was and why we needed one in South Africa.

About forty people were looking expectantly at me. Some might have been there directly from the underground at home, but most were comrades living in exile, a couple from the MK military camps, others from various political structures. I had three arguments, and my heart was racing. How would these comrades at the heart of the struggle, many risking their lives on a daily basis, take my reasoning?

The first argument, the diplomatic one, was easy. Being seen to support a Bill of Rights would put the ANC in a positive light. It would tell people, ourselves, the world, that we were not power-hungry terrorists waiting to seize power, to get revenge. On the contrary, it supported the idea that we were aiming to achieve a free, democratic and law-governed South Africa. The delegates nodded their agreement, no problem.

The second, the strategic argument, was a little more complicated. An entrenched Bill of Rights was our answer (note that I'm using the word 'our' – I was a member of the ANC until the 1994 elections, when I decided to be a candidate for the judiciary, and stepped away from political activity). It was, I repeat, *our* answer, developed primarily by Oliver Tambo, to group rights. This was a time when protection of group rights was being strongly promoted as the key to a constitutional settlement in South Africa. In non-technical terms, group rights were hailed as the foundation for creating a system of power-sharing between the white minority and the black majority. In more technical language, the principles of consociational democracy, as advanced by Arend Lijphart, were invoked in favour of adopting group rights rather than majoritarian democracy. Lijphart's central idea was that in deeply divided and segmented societies it is both principled and practical to grant as much autonomy as possible to the different community groupings. Each would then have a large measure of governmental control over its own special affairs, and all would accept governing by consensus at the

national level. Even our closest friends internationally, from East, West, North and South, were urging us to 'get real' and adopt some form of power-sharing along these lines.

It is a nice term, power-sharing – but power-sharing between whom? Between racial groups? The problem wasn't only that the Constitution would in effect be entrenching a grossly inequitable status quo in which the 13 per cent white minority happened by law to own 87 per cent of the land and 95 per cent of productive capacity. It would also be placing racial identity right at the heart of all the structures of government. Thus, parliament and the presidency would be shared between persons selected as leaders of the different racial and linguistic groups. As we saw it, this would mean that a form of apartheid would be moved from the sphere of separate development and Bantustans right into the institutions of the central state itself. At the same time, race discrimination would continue to be shielded in the private sphere by the mechanism of constitutionally guaranteed property rights and freedom of association.

Oliver Tambo was the great proponent inside the ANC of a completely different vision. He took constitutionalism and constitution-making very seriously. His point of departure, however, was not that black and white groups should live side by side in separate communities protected by power-sharing arrangements. Rather, it was to secure the fundamental rights of all, black and white, in a united, non-racial South Africa. He had no problem in principle about accepting group rights for workers, or women, or children, or members of language groups and faith communities,

... but Tambo refused to 'get real' and introduce constitutionalised markers of identity, culture and historical provenance into the very formal structures of government itself. Instead, people would have their fundamental rights secured, not because they belonged to a majority or a minority, but because they were human beings.

Thus, the instrument to protect people from future abuse, humiliation and dispossession would not be power-sharing between ethnic groupings but an entrenched Bill of Rights guaranteeing the dignity, equality and freedom of all. The delegates cottoned on quickly. Once more I noticed nods of agreement. No need for my heart to go boom, boom, boom.

What was the third reason for having a Bill of Rights? It was advancing this, perhaps the most profound and deeply principled reason of all, that was causing my heart to race. We needed a Bill of Rights, I said, against ourselves.

What would the delegates think? It was easy for me, a lawyer who had grown up with the privileges that went with a white skin, to come up with these ideas ... I looked into the eyes of the audience. To my joy instead of hostility or repudiation, I saw looks of delight. It was as though they all felt a sense of reassurance that the Constitutional Committee, fulfilling the mandate given to it by Oliver Tambo, was urging the creation of institutional mechanisms against any abuses of power from any quarter whatsoever in our new democracy. This was not for us a matter of pure political or legal philosophy. We were living in societies where many people who had fought very bravely for their freedom had gone on to become authoritarian heads of state themselves. Jomo Kenyatta was held up as a prime example; jailed by the British for years, he had gone on to use his status as president of Kenya to seize land and amass a fortune for his family. Indeed, we had seen inside our own organisation how Oliver Tambo, with the support of people like Chris Hani and Joe Slovo, had from time to time been obliged to take firm and principled initiatives against unacceptable forms of conduct and abuses of power.

If anything, I had been a rights sceptic. Strongly influenced by critical legal studies ideas, I inclined to the view that it was wrong for essentially political issues to be decided by the courts.

I sometimes get praise for being the person who introduced the Bill of Rights into the ANC. It was completely the other

way around. It was the ANC, Oliver Tambo, who persuaded me that in South African conditions, a Bill of Rights could enunciate the quintessence of all we had been struggling for, convert the Freedom Charter into an operational document, and become the cornerstone of our country's new constitutional order.

The judiciary would then become a crucial instrument for ensuring that core elements of political morality would be maintained in the new society. They could also see to it that the rights of workers, women, children, the disabled and the poor were respected.

A month after urging acceptance of a Bill of Rights, I was blown up. I can't help thinking that the real target was Mathews Phosa, who was then deep in the underground in Maputo, with the code name of Freddie. But they couldn't get him and I was a sitting duck, so they blew me up instead. I'm not blaming you, Mathews; indeed, the operative who planned the operation has stated on film that my name was on the list of 'those deemed important enough to be eliminated'. Anyhow, as soon as I was out of hospital some months later, the Constitutional Committee of the ANC flew to London. And, fantastic though the intervention of surgeons and physiotherapists and occupational therapists had been, the best, best, best medicine I received was of a different order: I was asked to work with Professor Kader Asmal on drafting the first text of the ANC's Bill of Rights for a Democratic South Africa.

The Bill of Rights for us, then, is not just another legal document. It is life and death, it is who we are, it is the foundation of our transformation in South Africa. It certainly acknowledges and embraces multiculturalism. But it does so without allowing group rights to become the foundation of the governing structures of our new constitutional order. That was foundational. From a political point of view, our institutions simply had to be non-racial.

Once the principle of non-racial democracy was accepted, then the issue of multicultural diversity could be handled within that framework.

It took six years to get our Constitution and it wasn't easy. It wasn't FW de Klerk and Nelson Mandela getting into a room, doing a little deal; you give me this, I give you that. The process was robust, filled with conflict and setbacks.

It took us six hard years; we had breakdowns. Chris Hani was assassinated, we had rolling mass action, we had massacres. It was extremely tense but we never let go of the ideal, and we got it. We, as South Africans, got this amazing Constitution! And twenty years afterwards we can have the open, free debate that we're having in this City Hall Chamber.

The democracy we take for granted emerged in a situation where nobody in the world felt South Africa stood a chance. A racial bloodbath was seen as the inevitable outcome. It's not only that we avoided catastrophe, we established a strongly implanted Constitution with institutions, mechanisms, principles and values that enable us today to deal openly and robustly with the many, many things that concern us and worry us and ravage us. We do so with the knowledge that we've got the vote, we've got free speech, we've got an independent judiciary, we have strong political parties, open contestation. We take the openness of our society for granted. It's great we take it for granted, and it's sad we take it for granted. Great because it's normal, that's the country we're living in; and a little bit sad because we don't give ourselves credit for our enduring achievements.

We beat ourselves up too easily, I believe, too quickly, because many things are happening that many of us are very, very distressed about. But that should be a reason for using the democratic rights we have won to bring about the changes we desire, rather than to descend into despair and, at times, self-flagellation.

Once the issue of directly constitutionalising group rights in our institutions had been taken off the agenda, then issues of how to respect

and balance out different community, traditional and cultural interests could come to the fore. This they could now do in their own right, and not as proxies for political and economic power. Problems of race, gender, disability, sexual orientation and so on, are ubiquitous and are dealt with by the equality provisions of the Bill of Rights. Similarly, unfair discrimination on the basis of language, culture and religion is prohibited.