



INCLUSIVE SOCIETY
INSTITUTE

Annual Lecture 2020

**PUBLIC ETHICS, MORALITY,
DEMOCRACY & SOCIAL COHESION:
IS SA MEASURING UP TO THE 1994 VISION?**

**JUSTICE
ALBIE SACHS**



INCLUSIVE SOCIETY
INSTITUTE

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INTRODUCTION BY VUSI KHANYILE, CHAIRPERSON OF THE INCLUSIVE SOCIETY INSTITUTE

As this is the first annual lecture hosted by the Inclusive Society Institute (ISI), let us briefly visit the whys and wherefores of the Institute itself. In a nutshell, the Institute is an autonomous and independent institution, a not-for-profit organisation (NPO), which was founded for the purpose of supporting and promoting non-racialism, non-sexism, social justice and cohesion, economic development, and equality in South Africa. The Institute has existed for just 12 months and is governed by a board of directors and advised by the Advisory Council.

The Institute puts its purpose into practice by conducting research and analysis which contributes to debate on public policy. It also seeks to promote education on democracy through special briefings, seminars, and conferences. Furthermore, the Institute aims to create a portal that will archive our liberation heritage, for it is within this heritage that the division of a democratic, prosperous, caring, and inclusive South Africa is enshrined.



Vusi Khanyile
Chairperson
Inclusive Society Institute

The Institute's motive behind carrying out these aims is to encourage the country further along the path that moves it in the direction of its strategic vision. The Institute is broadly aligned with social democracy – an ideology that promotes social and economic interventions that are aimed at advancing social justice. It does so within a framework of a democratic, free-market society. Hence, it promotes the voices of the people in determining government actions, supports a competitive economy, whilst also offering a safety net to the poorer and more vulnerable in our society.

This economic growth and sustainable social development need to be balanced. The ISI considers the developmental state model as the most appropriate approach for transforming the economy and society in South Africa. It believes that the well-being of South Africa is best served by an inclusive society in which the composition of the economy, government, and civil society equitably reflects the composition of the nation.

In fact, issues of public ethics, morality and social cohesion are uppermost in the national psyche and mood at the present time. It is with this in mind that the ISI hosted the first Annual Lecture – with the promise of frank and open debate on these issues, at the event and moving forward.

INTERVIEW WITH JUDGE ALBIE SACHS (RET.), CONSTITUTIONAL COURT JUDGE, CONDUCTED BY LWANDO XASO, WRITER AT THE DAILY MAVERICK



Lwando Xaso
Interviewer

I would like to start by focusing on how the courts, and specifically the Constitutional Court, can shape the moral character of our nation. In 1962, Nelson Mandela was arrested when he returned to South Africa, for leaving the country without a valid passport and for inciting an illegal labour strike. He was sent to the Old Fort prison, which is today the home of the Constitutional Court.

During that trial, he made the decision to represent himself, against the advice of his lawyer, Bob Hepple, who knew that Mandela was going to provide a very political defence and that he was going to ask the magistrate in the trial to recuse himself, because he did not believe the magistrate was able to dispense justice.

Bob Hepple, having listened to Mandela's argument for recusal, told him that it wasn't a legal argument he was making, but a political argument. Nelson Mandela responded that it wasn't a

legal trial, but a political trial. Nonetheless, Mandela stood up in court and said: "In a political trial such as this one, which involves a clash of the aspirations of the African people and those of whites, the country's courts, as presently constituted, cannot be impartial and fair. In such cases, whites are interested parties. To have a white judicial officer presiding, however high his esteem and however strong his sense of fairness and justice, is to make white judges in their own case.

"It is improper and against the elementary principles of justice to entrust whites with cases involving the denial, by them, of basic human rights to African people. What sort of justice is this that enables the aggrieved to sit in judgement over those against whom they have laid a charge? A judiciary controlled entirely by whites, and enforcing laws enacted by a white parliament in which Africans have no representation, laws which in most cases are passed in the face of unanimous opposition from Africans, is untenable."

Judge Sachs, or Albie, what was it like to be a lawyer at that time, one that is an accused, as Nelson Mandela was? What was the justice system like for African people, specifically, in 1962? Mandela himself said, "I feel uneasy in this court." I get a sense that Mandela was already imagining an African court. What does an African court look like?

I'm going to start off with a correction in relation to Bob Hepple's role. Bob and I were both sons of activists, both in the underground, both lawyers practising in courts that were, of course, promoting injustice, but we were using every possible space available to change that.

Bob was thrilled with what Mandela was doing because they were comrades. But Bob said, "I can't do it. I'm an officer of the court and it would be complicated for me to make that challenge. In legal terms, it's not going to get us anywhere. But, Comrade Nelson, you could do it."

with such power and such forcefulness and with such dignity that, I read, afterwards, the prosecutor in that case went to his office and cried. This was a white prosecutor, part and parcel of this repressive system.

The magistrate listened and then sentenced Mandela to the fullest term possible. At that stage, he had the power to sentence him to five years' imprisonment. It was a very important moment in the life of our nation, it was a prelude, if you like, to the full liberation struggle.

However, the fight wasn't simply within the framework of the existing legal system to achieve greater rights. It was also to challenge the whole framework itself. Although the armed struggle had really begun before that, now Mandela's connection with the armed struggle was highlighted.

It was enormously difficult functioning in those courts. The laws were overtly racist. The law said only whites could be members of Parliament. It reserved most of the land for whites. It brought about the Native Administration Act. People like you, Lwando, weren't citizens with rights. They were subjects to be administered.

Despite the fact that they could have 'rights' in the Bantustans, and 'rights' under tribal leaders, it was a grim system in which we didn't have rule *of* law, we had rule *by* law. It was all being challenged with characteristic dignity and poise and thoughtfulness, and also power – power that came from the oppressed, through the words of Mandela.

It was difficult not only for black people functioning in the courts, but for all who had to witness the injustice. Black people had to stand at places reserved for them. Even Mandela's law partner, Oliver Tambo, was told by the magistrate in a case to move to that reserved space to address the court. But Tambo refused to do that and, as a result, was threatened with contempt of court.

Eventually, it was Godfrey Pitje who took over that role because Tambo and Mandela had political work to do. One of the functions of a legal assistant then, in addition to doing everything else, was to take the rap for your principals, so that they could carry on with revolutionary activities.

Tambo was sentenced to a fine and imprisonment. The case went on appeal to the Appellate Division and the Chief Justice Steyn ruled that you can address the court as well from one place as you can from another. He upheld the indignity of being told you're not a lawyer, you're a black lawyer, and therefore you have to stand in the place in the court reserved for black lawyers in order to address the white magistrates, white prosecutors, white officials in charge of everything. And the accused were overwhelmingly black.

So, for all of us practising in the courts in those days, the mental gymnastics was just terrible. We had to find the language or dignity or poise to deal with it. Even simple things, like how to address a witness, were skewed. For example, if the witness was a white woman, you would address her as Miss or Mrs and with her surname. Whereas, with a black woman, who could be the same age or older, you had to address her simply with her first name.



Judge Albie Sachs

Now, what do you do then when you are counsel and you want to call the witness? Do you say, 'Mrs Shabalala, what did you see?' It would be like slapping the magistrate in the face. And that's fine, but it might be bad for the case of the accused.

We were doing these gymnastics all the time, in a racist environment, with racist vocabulary, racist assumptions, trying to uphold principles of dignity in relation to laws that are racist, courts that are racist. But we tried to manage as best we could to manoeuvre in those circumstances.

What Mandela was doing, in a sense, was anticipating the liberation of all of us as lawyers. He was throwing off these chains. He was standing up and saying: I have no disrespect for you, Your Worship. And what I'm saying is not directed at you as a person. It is directed at the situation that I am clearly a black man in a white man's courts, and I shouldn't feel that way. I should feel I'm just a human being.

It was one of the great moments in South African history, and I'm glad that we're starting off the discussion with that particular moment.

I'm imagining Nelson Mandela at that moment, standing up in court, wearing his cultural clothing, an African kaross. What do you think he was communicating in court, being dressed the way he was? I know, when it came to conceiving a new court, what the judges would be wearing in court was something that you and your colleagues thought about.

The other thing I'd like you to comment on is as to why, during the struggle, courtrooms were seen as an opportunity? Why make a statement like that from the dock, like Mandela did in the Rivonia Trial as well?

I am myself a lawyer, and I don't know if I would have wanted to be a lawyer under apartheid, because when I became a lawyer in 2008, I had to swear to uphold the Constitution of this country. That's something that I'm proud to do. But back then, we didn't have the Constitution that we have now.

You always talk about being a lawyer, but at the same time being labelled a terrorist. So, you had this dual relationship with the law, in that you were supposed to dispense justice within an unjust society, but at the same time, you were also trying to sabotage the very system of which you had sworn to uphold the laws.

Let me deal with the dress, first of all. Mandela was a very natty dresser, and he could carry off good clothing. He wasn't a show-off, but he paid attention to his appearance, as did Oliver Tambo. As a lawyer, he deliberately chose not to wear a suit. He chose to wear traditional garb to make a strong statement, not just to the magistrate, the people in court and the press, but to the African people. He was saying: I am speaking as an African and I'm wearing, proudly, the clothing of an African person in the community I grew up in.

Today, I'm wearing a Madiba shirt. He didn't like being trapped in the formal clothing imported from Europe, with strange things like bowties. He wanted to wear something that was expressive of his personality. He even invented a dress style – an interesting, informal, comfortable kind of garb that has a certain value, an emotion to it. It happens to connect South Africa and Asia.

And so, he even made something out of the Madiba shirt, which he was wearing when he signed the Constitution. It became a representation of Africa joining with the world. It was a batik design from Indonesia, styled in a way that he felt comfortable with, expressing himself as Mandela.

When it came to the Constitutional Court, the question of style wasn't more important than substance. But it wasn't unimportant. We didn't want a building that looked like a copy of the US Supreme Court, with its grand steps and massive columns representing power. The irony of the Supreme Court is that you don't enter it by going up those steps. For security reasons, instead, you enter around the side, the back of the building. All of that in front is just for show. It gives an indication of that court representing a certain power. We wanted a court that didn't represent power, but, rather, control of power – in terms of ethics, values, accessibility, humanity, human dignity. Not of form over substance, but of substance of the human heart, the human soul, the human suffering, human aspirations, to be represented in the style and functioning of the court.

We chose the site of the Old Fort prison to erect our court, to locate the court that would dispense justice and uphold fundamental rights, on the very site of Number Four prison. The site of pain, the site of suffering, the sword where people have been locked up and denied their rights, was transformed into the ploughshare of justice.

We also wanted the building to be open, comfortable, inviting, free and friendly, with all the fabric, texture, light, and sensibility of a space in Africa. Not a space in Europe planted in Africa, but a space in Africa planted in Africa. Drawing on the imaginations of the world, the architectural possibilities of the world, but containing a strong African flavour.

In 2004 we opened the building. This was before there was talk about decolonisation – we were decolonised, I'm proud to say, in our minds – before it became a very important issue that was being raised by young black people challenging aspects of the colonial, the old imposed value system and ways of looking at the past. We were challenging it in terms of the architecture, and in terms of our style.

The last part of my previous question is that when you decided to be a lawyer under apartheid, why did you see that as an opportunity? Considering how oppressive the law was, considering how the justice system was biased, it was not impartial.

Why did you think that would be a worthy endeavour, becoming a lawyer? This a question I would have loved to ask Nelson Mandela and Oliver Tambo, and many other black people who became lawyers at the time, who saw the justice system as an opportunity when it was so clearly biased and partial.

It was Thuma Mina [send me]. We wanted them to be there. Quite a few people who became lawyers had been teachers. When Bantu Education was imposed, they were thrown out of the schools where they were teaching, where they couldn't bear to teach Bantu Education. Many of them, like Godfrey Pitje, became attorneys.

But it wasn't simply a job to earn a living, to survive. It was a terrain of struggle. You could fight in the courts; you could fight to expose the tortures, the injustices; you could fight to challenge the laws. And we won big victories. In the 1950s, we won all our cases, even the big Treason Trial, because the prosecutions were so ridiculous.

Then, in the 1960s, we lost all our cases. When you took a case in those days, you were fighting against the death penalty. You were fighting to get some of the accused acquitted, to expose the torture, to give the accused a sense of dignity, and so that there would be somebody listening to them, believing them.

We had some good judges: John Didcott, John Milne and Andrew Wilson were all wonderful judges. We also had other judges who were at least open-minded. Michael Corbett played an important role in the transition afterwards. He

fought against Hitler; he was anti-fascist. He was an open-minded person functioning within a racist framework, and he had to use what space was available to try to shift that.

There was a famous debate between Raymond Wacks and John Dugard. The question was whether the judges should resign. Raymond said that they should, that they were simply progressive judges giving legitimacy to an oppressive system. But John, who was fighting in the courts, in the trenches, said they shouldn't resign. And we who were in the resistance also believed they shouldn't resign. We wanted good judges there to soften the impact of the law, to win the few little victories, and to prepare the way for the day when we would have a truly democratic nation.

Some of the judges of that era, like Johann Kriegler, Laurie Ackermann, I've already mentioned John Didcott, Richard Goldstone, used the tiny glimmers of space in the courts to trip up the apartheid laws, to start coming up with a vision of what law could be like one day in South Africa.

They served wonderfully on the new Constitutional Court during the transition, so that the brilliant new South African Constitution could be applied with style, with dignity, with force, in an experienced way. So that we weren't tripping over our own feet, as we were starting something completely new.

For those who don't know, South Africa has had five constitutions. I would say it's had three illegitimate constitutions – 1910, 1960 and 1983 – and then our first somewhat democratic constitution was produced in 1993, after a process of negotiations between the liberation movement and the apartheid government.

The significant achievement with the 1993 constitution was to establish a Constitutional Court. The sense was that having a new court would transform this judiciary, which was known to be oppressive, that the people wouldn't trust that the courts which had existed under apartheid would dispense justice in an impartial manner.

Albie, at that point, I'm sure you didn't think that you would be one of the people sitting on that court in two years' time. But when the Interim Constitution was adopted and there was a vision of transforming the judiciary, what role did you think the court could play in the country? Was it simply in legal matters? Symbolically, what role did you think the creation of a new court could play, in the effort of transforming a judiciary that was known to be so oppressive, in a broader society?

We were such a strange court, with the backgrounds of the people on it being so vastly different. But that was also such a great source of strength for the court. In my own case, I never dreamt I'd be a judge. Judges were the people up there on the bench; I was simply an advocate practising on ground level. There were some judges who were kinder and more thoughtful and more open than others. There were also many who were openly racist and reactionary, and so on. To me, judges belonged to another world.

Suddenly, though, when we had a Bill of Rights, fundamental rights, and everybody could vote, then we had the chance to create a new constitution. The Constitution became a richly-imagined thing, a marvellous creation of South Africans, and to be using my skills to defend it was just the most incredible experience.

I still recall so vividly, it was just before the elections in 1994, when we didn't know what was going to happen. We'd been fighting for freedom long and hard, and suddenly we were going to get it. We had to change our whole mindset. We were no longer living for the future; we were becoming part of the future.

We assumed Mandela would become the President, but we were wondering who the Minister of Justice would be. We wondered whether it would be one us: Kader Asmal Zola Skweyiya, Dullah Omar, or Albie Sachs. At that point, I couldn't bear the thought of having invested my whole life in an ideal that would now become a job. I thought about getting out of that line of politics. I could still be politically active, but not in that way.

Then I realised that it would actually be fantastic to be on that court, an unbelievable opportunity for me, as a freedom fighter, to be on that court, defending the changes we'd been fighting for. But I decided that if I wanted to be available for the court, I couldn't have a loyalty to both the ANC National Executive and to the Constitution, constantly having to choose between the two.

I would still be Albie the freedom fighter, I would still have the same ideals, but those ideals would now be in a document that we would all sign, and I would have to defend that document. And if the ANC was going to be a party to litigation, I couldn't be worrying about what the comrades would say about any decisions I gave from my position on the court.

I knew it would be quite impossible to be giving decisions from my position on the court one moment, and then heading to a branch meeting the next. So my conscience told me I needed to resign from the NEC, and afterwards, to resign from the ANC, to be free and fair.

It wasn't a repudiation of my beliefs; it was a continuation of our beliefs, because the Constitution now incorporated what we'd been fighting for. It was thrilling to be with such extraordinary people ...

Arthur Chaskalson, whom I'd stayed with many times – a great intellectual. He wasn't in the underground, in the resistance. He fought within the framework of the courts and gave up a lucrative legal practice to set up the Legal Resources Centre.

It wasn't a repudiation of my beliefs; it was a continuation of our beliefs, because the Constitution now incorporated what we'd been fighting for

He gave up that combative style that you need to be a tough advocate – sharp elbows, witty, quick, smart – for a much more collegial, collective way of working. One where you're not fighting just to earn a good salary in fees from the cases that you undertake, to win particular battles, but you're also fighting together with a team to try and deal with the Group Areas Act, to deal with the Pass Laws, to try and trip them up, and so on.

Ismail Mahomed was brilliant, sharp, brave, thoughtful, living in his head, living for the law, difficult, complicated in many ways. But he could soar, he could reach heights that none of us could reach in terms of the lyrical things.

Johann Kriegler had his own particular beautiful style of writing. He was deeply, profoundly committed to the country, the cultures of the country.

Yvonne Mokgoro, having grown up in a rural area, worked as a hospital nurse in order to earn money to study, and became a professor and a judge on the court.

Kate O'Regan, being my colleague at UCT. And many more. A wonderful team, a group of people who couldn't be more diverse in personality and style but couldn't be more united in terms of our hatred of apartheid and love of the Constitution.

In any event, we established a style and a way of working, sitting around the table. Those of us who'd been in the struggle were used to debating everything, through the night if necessary. We weren't going to give that up simply because we were judges now; we continued to debate, round and round the table.

Fortunately, our colleagues like Didcott and Kriegler and the others, also loved debates and openness. They loved that style. They hated formalism – if they had loved formalism, they wouldn't have been on the court. They all had passion and they all knew we were doing something remarkable, something new. New, I would say, in the world, in terms of the kind of court, the kind of constitution and the role that was given.

We knew that there would be resistance from many of the judges on the existing judiciary, despite the imbalance. At the time of the new Constitution, there were about 150 High Court judges: 148 white, two blacks, 148 men and two women.

So, it wasn't just that the public had a distrust of an institution that had been part and parcel of the system of oppression – sending people to jail because they didn't produce their passes, forcing people out of their homes, applying all these racist laws, turning a blind eye to the torture, the police throwing people out of buildings, and magistrates saying nobody was at fault, saying that Imam Haron got all the bruises on his body by slipping on a piece of soap and falling down the stairs. It wasn't only that.

It was also that they didn't see themselves represented on the bench. They didn't feel that wisdom, a sense of justice, a sense of fairness, an understanding of human life was represented on the bench. In fact, only a small minority of the people were.

We had to be a new court both symbolically, and in terms of the way we worked and upheld the new values of the Constitution. Values that were based on human dignity, equality, freedom, on totally turning the apartheid legal system on its head. This was a marvellous challenge, and I had wonderful colleagues. I was so proud of the role that the Constitutional Court played then, and I continue to be proud of the role that it is playing today.

I think one of the sad things about apartheid is that it really robbed the country of so many talented people who could have contributed so much to South Africa. It robbed the country of innovation, of creativity, by saying that certain people, by virtue of their gender or their skin colour, couldn't assume certain positions. That, for me, is one of the truly tragic outcomes of apartheid.

When I think of our constitution now, it's about opening up South Africa. It's about creating a very integrated South Africa, an imaginative South Africa, a creative South Africa.

I truly believe that the Constitutional Court is one of the few examples of what a decolonised institution looks like. And I think it's because you and your colleagues were given a blank slate and you were told to create something that was authentically South African from scratch.

What you did with that was question to everything. Why do judges have to wear black robes? Why do judges have to sit above everybody else in court? Why does a court building have to look like a sterile environment with no imagination, no artwork, just bland?

You questioned every single thing, and because of that, you were able to build an institution that is still strong today. Albie, I want to take you back to the 14th of February in 1995. Nelson Mandela is sitting on the bench with all 11 judges and he is inaugurating the court.

You're all wearing your green robes. You're about to hear your first case, which is a very sensitive matter that could change the moral character of South Africa in a significant way. For me, it's a full-circle moment, because in 1962, Nelson Mandela said, "I do not feel at ease in this courtroom. I'm a black man in a white man's court. I'm an accused." And there he is, in 1995, in a courtroom again. But this time, not as an accused, as a president who is inaugurating a brand-new court that is partially conceived from his imagination. That is being built by African hands and minds. What was Nelson Mandela's call to the 11 of you on that day? What did he set as an expectation to all of you as the judges of this new institution?

I remember that moment so well. It was temporary accommodation. We couldn't have a raised Bench, because the ceilings were quite low, but afterwards, in our new high-vaulted building, we decided to keep the low seating for the judges.

Allow me to paint the scene. Mandela's sitting with us. It's a small room jam-packed with our relatives and friends. We're all very excited and he's in the middle. I was on the Visitors Committee, so I had to plan the whole meeting. Everything was going beautifully, until he got a bit hoarse and reached for a glass of water. But I hadn't thought of that glass of water!

So, I'm sitting up on the bench now, the biggest moment in my life, and I'm chastising myself for not thinking of that glass of water for Mandela. But he was nice about it, and put the moment sharply in context when he opens up by saying, "The last time I was in court was to find out if I was going to be sentenced to death. Today, I inaugurate South Africa's first Constitutional Court, a court on which the future of our democracy will depend."

The change must take place according to law, according to the Constitution. Not through anarchy, grabbing, and self-enrichment, or corruption

He was far-seeing. This wasn't just another court sitting in the background, like a longstop in cricket, to pick up any failures in society. It was a court that was deeply integral to the implementation and the development of the democracy and would be for transformation.

In some countries, the courts are there just in case there's some kind of failure. You feel you're in a functional society, and the courts are simply there to make sure nobody slips up. In our country, the court is there to say we're living in a dysfunctional and unequal society, and we are trying to change that.

We have a constitution that requires change and remembers the injustices of the past. At the same time, the change must take place according to law, according to the Constitution. Not through anarchy, grabbing, and self-enrichment, or corruption.

So, seeing the central role the court played, it was wonderful. Mandela was so loving and protective of the court, and he showed it in the best way he could. And how did we show our respect for Mandela, who had appointed us, who had given so much of his life to the Constitution? To show our gratitude, six months after being inaugurated, we struck down two highly important proclamations issued by Mandela!

People have forgotten about it now, but they were the proclamations that were supposed to give us our first democratic local government elections. They were very good laws; they were necessary laws for democracy. But we stopped them.

Parliament had asked Mandela to pass the laws, to save time, to save expense, to get the show on the road. They trusted Mandela would do a good job. But it was against a profound constitutional principle, namely, that Parliament had to pass the laws itself, and not ask the President to do so...

Mandela appeared on television afterwards and said that his legal advice had been that he had the power to pass that law, but that he now accepted that the legal advice was wrong. Fink Haysom, our former comrade on the Constitutional Committee, was the one who had given that legal advice. Mandela wasn't throwing Haysom under the bus, though. He was saying that, as President of the country, he must be the first to accept the rulings of the Constitutional Court.

That moment was as important as the 27th of April in 1994, when we became a democracy. On that day, later in 1995, we became a constitutional democracy, when the president accepted, and afterwards Parliament accepted, the rulings of the Constitutional Court, affirming the Constitution.

Since then, each President has accepted the rulings of the court. Thabo Mbeki accepted the rulings on access to HIV antiretrovirals in the TAC case, whether he was happy with them or not. And we now have the biggest antiretroviral programme in the world.

Jacob Zuma accepted the ruling of the court in the Nkandla case. I don't think Cyril has had a ruling against him yet, but I fully expect that if there were to be a ruling against him, he would accept it too. And he wouldn't be the first to have to accept the ruling, he would be the fourth.

That is so fundamental. I saw Gloria Steinem on TV the other day, saying the Constitution doesn't open with the words: "I, the President", but rather with: "We, the people." That idea was being upheld through the Constitutional Court having authority, having legitimacy and prestige, and having a Constitution that the people admired so much, that it didn't matter whether we were in the ANC, were non-political, or in other parties, we all agreed. It wasn't your party-political allegiance that mattered, it was allegiance to the Constitution. It somehow transcended the harsh battles.

Of course, you need harsh political battles, you need contestation, you need anger, you need joy, you need a whole series of different emotions in public life, But you also need a cool, calm and collected body, filled with the passion and energy of the nation, to rule. The Constitution rules, that's the fundamental theme, and that came through from Mandela, and hopefully will continue into the future.

I think you're so right, Albie. That day was the day we became a constitutional democracy. First there was the ruling against a sitting president – a very popular president who'd been elected by an overwhelming majority – there was the court impeding him from doing something. Leaving the question: where does the court get the right to do that, when the judges are not elected, but Mandela is?

I think the way that Nelson Mandela dealt with that moment, as you said, has really set the foundations of how the judiciary and the government interact with each other. But it hasn't been easy, in that there was a moment where you, a freedom fighter, a revolutionary, were called counter revolutionary. What did that feel like?

Did that feel like a threat to our constitutional democracy in that moment? That if you have politicians and public servants saying the judges are counter revolutionary, that could build up a resentment by the people against the judges, and against the judiciary?

It did feel like a threat. It reminded me of the kind of highly schematic language used in the struggle days. I felt it was very unfortunate. Now, I'm speaking as somebody who had been in the ANC and felt the ANC's greatest achievement. But the most undeniable achievement, the most enduring achievement, was the Constitution. Though not on its own, it had to find counterparts. I was thrilled to see Roelf Meyer as part of the board or the advisory group for the ISI.

But the thrust, the idea of creating the court and the values it symbolises came from Nelson, from Oliver Tambo, from ANC people. So, to start undermining and attempting to trash one of your greatest creations would have been self-defeating for the ANC at the time.

I don't think I'm giving away any secrets when I tell you that not long after Dikgang Moseneke made his controversial statement at his 60th birthday party, "I'm not answerable to the NEC or to anybody else" Kgalema, who was Deputy President at the time, came to the court for an off-the-record discussion. And Kgalema Motlanthe responded, "You're absolutely right. You're not answerable to the NEC".

He made it clear about any challenges there might have been had been made by one particular individual. An individual that is sometimes referred to as colourful, strong, a personality, and a person who says untoward things. Kgalema felt that particular individual regretted having made that statement, and although he's not the kind of person who is quick to say: "I'm sorry", he wouldn't repeat that particular error in future.

My last questions, before I ask you questions from the audience, have to do with a time before we even got to the judgement that was made against our former president, Nelson Mandela. It has to do with the first judgement of the Constitutional Court, that of the death penalty.

It's quite mind-blowing to know that in 1995, South Africa was still a state that had the legal power to kill its subjects and that this extremely sensitive matter became one of your first judgements. And in a country that, at the time, was very divided on the issue, with strong arguments for retaining the death penalty. Even to this day, people still want to retain the death penalty. What do you think the ability to kill its subjects, that power, does for the moral character of a country?

What was the tension in that case, amongst the 11 justices? What did you see as an opportunity, in your first judgement, to declare as a new way of being, despite the popularity of the death penalty at the time? Why was the State versus Makwanyane such an important case, even today? Not just for us in South Africa, but globally it's seen as a landmark judgement.

After the case was heard, Arthur wondered whether we had made a mistake, whether we should have started with a much more technical case with a constitutional dimension, and not with something so dramatic. I disagreed, I said we chose the most difficult case, the hardest case, and in a constitutional state, hard cases make good law. They force you to go deep into the values, and to think profoundly.

Ismail Mahomed said that in some countries, you have incremental advances and then you get a Bill of Rights, a constitution, that consolidates the advances that have been made. That wasn't the case in South Africa, where we had a radical rupture with a past that was uncaring, that was cruel, inhumane, and disrespectful to human dignity. Now our constitution envisaged a country that will be caring and respectful, and respect human dignity.

The death penalty case forced us to take an issue that would be unpopular in terms of the mass feeling – kill them, they've done terrible things, they deserve to die, to confront themselves – and bring in the idea of Ubuntu. It was Yvonne Mokgoro who raised it first. Ubuntu, the idea of the interconnectedness of human beings. The idea that if we kill each other in cold blood, in a sense, we are cutting off our own limbs. We are destroying ourselves a little bit. We are destroying a part of our society.

I must have appeared in about 55 cases as a young advocate, with a potential death sentence. Two of my clients were sentenced to death. One was hanged. One the judge spared through a recommendation of mercy. The feeling of horror when you are a lawyer defending someone and their life could depend upon your skill, is indescribable.

To make matters worse, in those days the outcome depended on the race of the victim and the race of the accused. If it was black on black, white on white, white on black, then there was no death sentence. But black on white, that was the main cause of the death sentence being issued.

The other factor it depended on was the judge. Didcott never passed a death sentence. Herbststein, in the Cape, never passed a death sentence. We had another judge, I won't mention the name, six death sentences every year. There was something arbitrary in it. And they have a similar situation in the United States, where it depends so much on which state you're in and the kinds of juries and the prejudices, and so on.

It's too much that the state has the power to take the life of a human being, cold-bloodedly, whether it's done through electrocution or hanging or poisoning. There's something awful about it. We all become party to this, and it reduces respect for human life.

That was our thinking. We didn't discuss the case before we went into the court. We only discussed it afterwards as we sat around the table, all 11 of us, with our very different backgrounds: some deeply religious, others committed secular people. Different backgrounds, different life experiences, all unanimously felt, in the new South Africa, that the state should not have the power to take the life of its citizens, however horribly they've behaved.

The real deterrent is not that you'll be sent to the gallows, it's that you'll be caught. You need to improve law enforcement. You need to deter people from doing things on the basis that they'll be caught and punished with long periods of imprisonment.

I was very moved yesterday to see, in the United States, the mother of one of the men killed by ISIS, saying she's so pleased that Britain said they will hand over the prisoners for trial in the United States, on the basis that they will not be executed if found guilty. She said: rather let them suffer in prison. Let them not become martyrs. Let us not become party to the cold-blooded killing of somebody else.

Albie, what I've gotten from our talk is that part of creating a new country is in the small details and in the big things. The small details of how you built an institution: the symbols of the court, the character of the judges who are on the court, the character of the building. Then the big things like the big judgements that you have handed down, which has literally changed the national discourse in South Africa on very divisive matters.

The Constitutional Court has been the steady hand that all South Africans, even when we do disagree with the court, we respect, out of the three arms of government. I think it's thanks to the early work that you all did in those dark days.

I'm going to move on to the questions that the audience has for you. The first one is, what is your view on the current political narrative in respect of the question of race, and the impact that it has on promoting reconciliation?

The second question, is South Africa measuring up to the 1994 vision? There was a clear upwards trajectory just after 1994. Where do we stand now in terms of ethics and social cohesion?

Then the third question I have is, what is your view on state capture, and it's undermining of the 1994 vision?

The question of race: I dealt with it when I was a political activist and when I was a judge. You can't get away from race in South Africa, and we shouldn't try to get away from it. If you do, you might say you're colour-blind, when in fact, you are simply socially blind. You are humanly blind. It's real, it's important, and our strength in South Africa, and our capacity to get through tough times in the future, comes from acknowledging the differences and difficulties of race. It's better to face up to them and deal with them in a principled way, rather than to say they don't exist.

Race is not just a proxy for poverty and injustice, and so on. It's intertwined with injustice, with accumulated injustice that still exists in our minds, our ways of doing things. At the same time, we must confront race in order to create a non-racial society. We must deal with it openly and honestly. We must create conditions for advancement.

Acknowledging the realities of race could be extremely important for whites in South Africa. To acknowledge, also, their potential vulnerability because of race, because of stereotyping of whites, because they are in a minority and they are seen by many as the source of all evil.

We've got to combat the realities of anger and the tensions that are created around race, but we need to do so in a manner that is non-racial, principled, and based on the Constitution, which is there for everybody's protection.

When we drafted the Constitution, I remember people saying they simply wanted to forbid unfair discrimination, that that would be enough, but many of us didn't believe that was enough. We looked at the Supreme Court in America, which struck down the rule in Richmond, Virginia, that said in any transactions that were undertaken, 15% of municipal contracts had to be set aside for minority service providers.

The Supreme Court majority struck that rule down, saying that it was taking account of race, and they believed in a race-free society. Thurgood Marshall almost wept when he wrote his dissent, and he said those of us who knew the realities on the ground, knew how important it was that here was Richmond City Council, mainly whites, taking a progressive step to undo hundreds of years of oppressive history, and the Supreme Court, in the name of non-racism, just struck it down.

So, we added section 9[2] to the Constitution, which expressly allows for measures of redress based on race and gender to be taken. If you look at the preamble, look at the injustices of the past, all of this relates to race. But we're not trapped in race, it's not the only factor. We can't use race, then, as a proxy for self-advancement, corruption, getting ahead or for deployment of people who are not qualified for particular jobs, whatever their race might be.

Furthermore, we can't use identification of people because they happen to be of Indian origin or from the coloured community, as mechanisms for marginalising them or denouncing them or creating rage against them.

I don't want to get into the subject of hate speech, that's very much before the courts at the moment, but in cases where hate speech has cropped up, the Constitutional Court has made it very clear that freedom of speech doesn't allow freedom to promote hatred in a way that undermines the very foundations of our society, which depends upon respect for every person. Hate speech, from that point of view, has to be looked at with constitutional eyes. I won't say anything more on the subject, because the Constitutional Court is in the process of dealing with that particular issue.

In terms of the 1994 vision, our vision then, in creating the Constitution, wasn't to say now that we have the Constitution, we'll have a great society. The Constitution doesn't create the society, it provides the mechanism and the values for creating the society. It doesn't build homes, it doesn't build schools, it doesn't stop corruption.

It doesn't end racism.

And it doesn't eliminate racism. But it gives you the mechanisms for doing that. Our vision then, of empowering the people through elections, through voting, through having fundamental rights, to that extent our vision has been maintained. South Africans speak freely. They speak their minds. They can set up different organisations and groups. They campaign. We have wonderful investigative journalists.

We, South Africans, can take pride in the fact that we brought down Bell Pottinger. They were supporting the crooks and the rascals all over the world. South Africa brought them down. They struck a rock, in that sense, a hard, painful one.

It's not just the President of the country who had to pay back the money, South Africa forced KPMG to pay back the money too. We have institutions that work. We have electoral mechanisms that work. They could work better, but they are working.

Our elections are freer and fairer than the elections coming up in America quite soon. Some of the vote suppressing mechanisms that are being tried there, would never be allowed in South Africa. We have a strong judiciary, a wonderful constitution that can be invoked, and strong institutions. We have a strong civil society that is free to function, to operate – whether it's marching in the streets, or thinking things through, or having debates. We also have a people that speak their minds. So, from that point of view, the 1994 project is alive and kicking. Unfortunately, it has to kick a bit harder than we thought it would have to do.

We don't change [the culture of violence in the country] through state violence. . . . we change it through developing a culture of non-violence

I'd like to mention at this point, I lived in Mozambique from about 1977 to 1988. It was a wonderful experience in so many ways. Great people who were very progressive on the emancipation of women, and on combating racism, on doing things for the poor. But we couldn't pull it off, and we ended up with a bitter civil war. I lost an arm, and many others lost limbs because of the landmines.

So, when I came back to South Africa and my comrades were still waiting for the Revolution, and as we were on the verge of it, there was a decision made to bring about a constitution, to go the peaceful road, I was so relieved. I'm so grateful that we didn't have the violence that beset Mozambique. We have violence and corruption, but we don't have it to the degree that they have had it there. And we have mechanisms to deal with it. From that point of view, I feel the project that we embarked upon of having a constitutional democracy where the people can make their claims, and try and right their wrongs, that project is strong.

Albie, before we run out of time, there is this last question that has come in. It says, we said no to the death penalty, but did we change the culture of violence in the country? How do we change the culture of violence in South Africa?

We don't change it through state violence. That's not the way to go. We change it through developing a culture of non-violence, and that's hard. It's not just violence from the state, it's gender-based violence. Our constitution is the only one in the world that provides a constitutional right, a protection against violence in the home, not just criminal law violence.

That requires men to come forward and women to speak out. It requires education in the schools and jobs for everybody, so that people don't go joining gangs, because there's no other occupation for them. It's a whole range of measures that have to be taken.

The one thing that gives me a source of hope is that the issue is out there in the open. We don't take it for granted. In that sense, we're not passive, we're not immobilised. We do stand up against violence and speak out against violence. We try to hold people to account for violence that is illegitimate and unacceptable.

State capture, I leave that to my former colleague, Zondo, to deal with that. It's a whole other big issue in itself. What is important is that we don't take these things for granted. We need to fight against the negative. We can use the Constitution as a mechanism to advance the positive, to advance hope, humanity, human dignity against all the things that are resisting and undermining our country.

Thank you so much, Albie. One thing I've learnt from clerking at the court for Justice Edwin Cameron, and working with you now in the work that we do for Constitution Hill, is that we run the risk of overburdening our judiciary with issues that should be dealt with through other tactics and strategies.

And that the Constitution was never meant to be a panacea for all the things that ail our community. What the Constitution is, is merely an opportunity, and unless we take that opportunity, then we can't expect it to self-actualise, because that's not what documents do.

I'd like to thank you for this very enlightening conversation. I hope people have gleaned from your answers that there's so much we can do, in terms of looking at the world through a creative way. If we change our institutions and learn from how the court built itself, if we take some of the lessons from the court, we can really build inclusive societies. We could really build a better South Africa, just through small things that we decide to do within our sphere of influence. So, thank you so much.



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