

Community Law Centre
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Seminário Internacional

“Globalização e diferença.
O direito ocidental em contextos não ocidentais”.

Albie Sachs

Western constitutionalism and African political culture

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7 a 10 de Fevereiro
Sala do Senado

THE COLOURS OF AFRICA

by Professor Albie Sachs
Justice of the Constitutional Court of South Africa

When I was a student at the University of Cape Town about 40 years ago, the map of Africa was painted green and red. Africa was a continent of few countries and many possessions; the red represented British colonies, the green French. There was some orange on each coast denoting Portuguese territories, and, if my memory is correct, the cartographic convention for what was called the Belgian Congo, was mauve. Our professor was Dr. Jack Simons, one of the great scholars and teachers of the 20th century, who had gone from South Africa to take his doctorate at the London School of Economics, where he had been taught anthropology by Malinowski and political science by Harold Laski, and to whose memory as a committed and creative scholar this paper is now dedicated. The subject which he was teaching us had been called Native Law and Administration; he was expected to train officials to rule efficiently over the African majority of South Africa through understanding their customs and law. Jack Simons turned the course around. He renamed it Comparative African Government and Law, and dealt with the fundamental philosophies underlying relationships between governors and governed throughout the continent. More than that, he encouraged the students to question everything, to argue, to debate. What had been the most bureaucratic and technical of subjects became the most interesting and alive. Students flocked to attend the course, even those not doing law.

In this, the first phase of his teaching, generations of students, mostly privileged whites, learned about the different policies pursued by colonial powers in Africa. In the green swathes, he

explained to us, the French rulers pursued a policy of assimilation. Their official stance was to incorporate a small African elite into French culture and society. The only legal system that was recognized was that of France. It was administered by judges and magistrates trained in France, speaking the French language and applying French jurisprudence. The Declaration of the Rights of Man applied to French citizens, that is, to those assimilated into French society, but not to the remaining millions living in territories colonized by France. French criminal law was enforced in all these territories, so that their inhabitants were subject to duties prescribed by French law but not entitled to rights guaranteed in the French Constitution. Instead, a vast domain existed outside the formal legal system where the so-called uses and customs of the indigenous people were tolerated rather than recognized.

The policy in the Portuguese colonies--referred to as overseas provinces--was similar to that of the French.

In the red-hued, British ruled patches of Africa, on the other hand, the official policy was that of indirect rule. A class of traditional leaders was co-opted into the colonial administration to act as local enforcers of the law. They functioned alongside district officers of the imperial administration, applying traditional African law or Muslim religious law to the people who fell within their jurisdiction. Two legal systems based on differing values, processes, and rules, functioned side by side. Generally speaking, the state administration and criminal law were governed by received English law, as was much of commercial and property law in the towns. At the same time, the colonial legal system acknowledged a functioning set of courts operating

under traditional or religious leaders, applying local law. The formal state courts exercised a supervisory role in relation to these traditional courts inasmuch as they could hear appeals from traditional court judgments. The general approach adopted by the courts of appeal was to apply what was called native law to disputes involving what were called natives, subject to a repugnancy clause in terms of which laws and customs considered repugnant to civilized principles would not be followed.

Jack Simons pointed out the differences were not as great as they appeared in terms of official policy. The daily lives of the majority of the people in the French colonies continued to be governed to a large extent by traditional or religious law, while in the British colonies a commercial and professional elite was formed whose day to day activities were regulated more by the statutes and common law imported from the United Kingdom than by traditional law. In any event, all the colonies were subject to autocratic political control by governors who were accountable not to the people over whom they ruled but to their masters in the metropolises. Western law in this setting was anti-liberty, anti-equality, and anti-fraternity. The rule of law gave way to administrative decrees and military rule by colonial authorities. What was universal was domination rather than any concept of fundamental rights. Sovereignty was based not on any concept of inherent or inalienable rights but on the notion of effective occupation¹ by a foreign civilized power. The legal regimes that operated were everywhere extensions of the

¹ The doctrine of 'effective occupation' was developed after the Conference of Berlin in the 1880s to give Britain, Germany and France a legal counter to the discovery or 'first occupation' claims made by Portugal in relation to what Western law at the time referred to as *territorium nullius*.

legal regimes in the metropolises, with certain limited, residual space being given to the indigenous people to continue practicing what were called their uses and customs.

For us in South Africa the issue was important because of its bearing on the policy of apartheid. Apartheid had recently been introduced by the Nationalist Party government as a determined rejection of any form of assimilation whatsoever. Although it claimed to be anti-British, in reality represented an extreme development of the British policy of indirect rule. Instead of granting the vote and general social and economic rights to all people on an equal basis, or even to a small black elite, the government sought to confine political rights for African people to the so-called tribal reserves, pockets of scattered rural slums constituting only 13% of the country's surface area. The policy culminated two decades later in the attribution of independence to six of these so-called Bantustans and the conferring of what was called "homeland status" on four others. During this process, indigenous African law was frozen as far as its social and cultural dimensions were concerned, and developed in an extraordinary form in respect of its political character. The democratic and participatory aspects of indigenous law were suppressed while the authoritarian and patriarchal ones were emphasized. Customary law, as it was called, was interpreted by white magistrates and applied by black traditional leaders in a manner which prevented it from evolving with the times and embracing a new spirit of equality consonant with the new lives African people were leading. Industrialization had destroyed the rural economy of African communities and created fresh patterns of living and different sources of income. It had also led to the formation of trade unions and political parties and the demand for universal franchise and equal rights in a single, united country. The claims of African exceptionalism and

cultural relativism came from people of European descent, while the struggle for the application of universal values was conducted by those of African origin. The historical paradox was that so-called Western ideas were rejected as inapplicable by those who claimed to be representatives of Western civilization, and incorporated into their demands by the dispossessed indigenous African people.

Jack Simons alerted us to these issues in an engaged, scholarly way, and forced us to think about them not simply at the level of political slogans but in terms of analyzing the systems of social organization under which people sought or were compelled to live. It was no accident that scholars such as he were imprisoned, placed under banning orders and eventually forced to leave the country. He chose to remain in Africa during his decades of exile, spending the second phase of his teaching life inspiring students at the University of Zambia.

Now he confronted the problems of state formation in post-colonial Africa. Zambia was no longer painted red on the map. It was the decolonized Northern Rhodesia, with its own president, its own parliament, its own constitution, its own name, and its own cartographic color. This was the period of Afro-optimism, as country after country achieved independence. Dr. Kwame Nkrumah, first president of Ghana had said: Enter ye the political kingdom, and all else shall be granted unto you. The reality which Jack Simons got Zambian students to analyze was different. State formation in the post-colonial era was proving extremely difficult. The constitutions with their patchy Bills of Rights, more or less unilaterally devised by British legal experts in London, were soon either redrafted or torn up. The decolonized countries remained

economically dependent, had small managerial capacities and functioned according to constitutions and governmental systems which had been imposed from outside rather than developed from within. Collective self-determination in the form of legal sovereignty did not lead to personal self-determination within the new societies nor to the creation of vigorous civil society managing its own affairs within the framework of a tolerant, flexible and supportive constitution. The positivist, command-based legal systems originally introduced by the colonial administrations carried on into the post-colonial era. They abhorred vacuums; everyone was subject to the sovereign, all the time. Progressive and patriotic persons, who wished to see social advance and an end to inequality, regarded capturing the state and placing forward-looking people in command as the key to success. Single party systems were regarded as vital to national unity. Pluralism and dissent were seen as inimical to unity and progress. It was difficult to promote concepts of fundamental rights in such a context. Faced with the collapse of the constitutional models which they had largely created, the Western powers now began to engage in extreme Afro-pessimism in terms of which they treated Africa as a continent doomed to veer between dictatorship and social disintegration. Even concerned and sympathetic observers started to regard the continent as exceptionally destined to have the right to receive aid rather than normally capable of exercising the right to enjoy rights.

As far as law was concerned, almost everywhere in the continent a dualism developed in terms of which received law applied to an urban and bureaucratic elite while the majority of urban poor and rural people in general had their lives governed by traditional law. The usual practice was for commercial law and criminal law to be applied by magistrates in the service of the state

on the basis of legislation and codes transplanted from France and statutes and common law imported from England. Traditional leaders, on the other hand, applied various forms of traditional law in the poorer urban areas and throughout the countryside. Traditional law was also recognized in the formal state courts on the basis of choice and lifestyles of the litigants. As for the human rights provisions of the constitutions, they were almost invariably overridden by legislatures, ignored by faint-hearted judges, or trampled upon by military dictators claiming African exceptionalism.

A third phase of the teaching life of Jack Simons came when thousands of young black scholars fled the schools and universities of South Africa after the uprising and massacres of Soweto in 1976. Imbued with the spirit of Black Consciousness, they sought the mental and physical means necessary to accomplish the full liberation of their country. Jack Simons became their principal professor in the camps in which they stayed in Angola. He now had to develop new ideas relating to a new class of students involved in attempting to establish a new social reality on the continent. This was a time when firm conceptual foundations of the new South Africa had to be laid. The principal problems related to how people of diverse backgrounds, speaking many different languages, having different faiths and political beliefs, and having long been locked in combat with each other, could live together as equals and in peace in one country. Jack Simons always believed that the economic integration of all communities in South Africa created the foundation for political unity and a common society. By a common society, he did not envisage a society of identical people sharing a single mode of behaviour and a single set of practices and beliefs. The right to be the same carried with it the right to be different--we should

be the same in terms of fundamental civil and political rights and different in respect of culture, taste, preference, belief and personality. He regarded the diversity of forms of social organization, of language and interests as a source of richness which gave texture to a common society rather than undermined it. His bravery in the camps in the face of bombing raids, his fierce intellectual inquiries, and the skillful and humorous way in which he engaged his pupils in debate, provided a living testimony of the capacity of South Africans of all backgrounds to work and live together on the basis of sharing and of full equality. There was a bond between this old white Afrikaner pedagogue and the burning young militants of Soweto that refuted all the claims of intrinsic separateness advanced by apologists for apartheid. The common endeavor to overthrow apartheid and establish a non-racial society was cemented both by shared life experience and by recourse to universal ideas about the inherent dignity of all humankind. These global values as expressed in international human rights instruments directly served rather than hindered the cause of African emancipation and self-expression. It was important to feel that South Africa was an integral part of humanity and to destroy the racial myth advanced by apartheid-minded defenders of cultural relativism in the sub-continent.

The fourth phase soon followed. Oliver Tambo, president of the A.N.C., asked Jack Simons to set up and preside over a constitutional committee of the organization, with the task of defining the constitutional foundations of a new democratic South Africa. The committee's mandate from the A.N.C. leadership was to give flesh to the concepts of multi-party democracy and an entrenched and justiciable Bill of Rights. Jack Simons brought together a group of legal experts to develop principles, policies, and texts based on these ideas, which would unite all those

opposed to apartheid and serve as a platform for the negotiated transformation of South Africa. The committee went on to establish a set of explicit constitutional principles which accorded a central place to a Bill of Rights.

The A.N.C. had first proposed a Bill of Rights in 1923. Later, in 1942, it had used the anti-Nazi Atlantic Charter as the foundation of a Bill of Rights for a free South Africa. In 1955 it had spearheaded a movement culminating in the adoption of a Freedom Charter. This document set out a vision of a non-racial, democratic South Africa, based on equal rights, multiparty democracy, freedom of expression, and guarantees of social and economic rights for all. What was new in the late 1980s was the acceptance of the idea of constitutional mechanisms based on an entrenched and justiciable Bill of Rights to make the Freedom Charter a secure and enforceable reality. From a tactical and diplomatic point of view, it was important for the A.N.C. to be seen as favouring fundamental rights for all. Strategically, an entrenched Bill of Rights was projected as a counter to the claims of the then rulers of South Africa to the effect that the white minority should enjoy special protections against majority rule; instead of having a special status which would in effect constitutionalize their privileges, the whites would, under a Bill of Rights, enjoy full protection of language, cultural, religious, and individual rights as citizens of South Africa on the same basis as all other citizens. Majority rule would then entitle the majority to govern but not to oppress. Most important of all, however, was the need to ensure that the successful liberation struggle was not followed by new forms of oppression and denial of rights as had unfortunately occurred in many of the countries in which we had lived in exile. Jack Simons was a strong believer in the importance of establishing institutional

mechanisms and a culture of public life which would ensure openness in society, freedom of expression and guarantees against abuses either by public or by private power. He faithfully and intelligently steered the committee in its early years to carry out the mandate given to it by Oliver Tambo.

The last phase of Jack Simons' life was for him both the most satisfying and the least rewarding. He returned to a new South Africa whose foundations he had envisaged in the 1950s, but now he was too frail to be actively engaged in the construction of the democratic and pluralist institutions for which he had fought. Almost speechless, he had to be carried up the steps to receive the honorary doctorate which the University of Cape Town was to grant him. He died last year having voted as one of 20 million South Africans who patiently stood in queues or were pushed in wheelchairs to exercise their franchise as equals for the first time. At a funeral service in his honour in St. Mary's Cathedral in Cape Town, we followed the request he made before he finally gave up life, and sang Onward Christian Soldiers, followed by African songs of struggle and the Internationale. In this way, Jack Simons, passionate rationalist and nonbeliever, was honoured in the vigorous yet delicate harmonies of the multiple voices, using the varied languages and representing the diversity of cultures, of what Archbishop Tutu called the rainbow people of God.

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