



Northern Ireland
Assembly

Ad Hoc Committee on a Bill of Rights

OFFICIAL REPORT (Hansard)

Briefing by Mr Albie Sachs

1 October 2020

NORTHERN IRELAND ASSEMBLY

Ad Hoc Committee on a Bill of Rights

Briefing by Mr Albie Sachs

1 October 2020

Members present for all or part of the proceedings:

Ms Emma Sheerin (Chairperson)
Mr Mike Nesbitt (Deputy Chairperson)
Mr Mark Durkan
Miss Michelle McIlveen
Mr John O'Dowd

Witnesses:

Mr Albie Sachs

The Chairperson (Ms Sheerin): Baroness Kennedy has had some technical difficulties, so we do not have her yet. If members are content, we will skip to the third item on our agenda, which is a briefing from Albie Sachs, who is a former judge of the Constitutional Court of South Africa. Albie is with us via video call. He has said that he is happy to proceed with his briefing. Albie is joining us from Cape Town today. I welcome him to the meeting. Thank you very much for being so flexible. Albie, do you want to begin? Albie, I think that you are on mute. *[Pause]* We have lift off.

Mr Albie Sachs: I am just attending to the earphones.

The Chairperson (Ms Sheerin): Technology can be a difficult thing.

Mr Sachs: Will you speak, please?

The Chairperson (Ms Sheerin): Can you hear us now?

Mr Sachs: Yes, that is much better.

The Chairperson (Ms Sheerin): Brilliant. I was just saying thank you very much for being so flexible and stepping into the breach. Do you want to start your presentation?

Mr Sachs: I will start right now. I do not know who I am speaking to.

The Chairperson (Ms Sheerin): Sorry. I am Emma Sheerin. I am the Chair. We have Michelle McIlveen in the room as well. Two members are joining us by video call — Mark H Durkan and John O'Dowd.

Mr Sachs: OK. Although I have done a little bit of homework on you, I do not know who you are or who is on which side, and that is an advantage. *[Laughter.]* When I was just back from exile, I was

asked to go to two universities in Cape Town. One was the University of the Western Cape, which was set up for people of colour. It was called the bush university. The other was the University of Cape Town. Kate O'Regan was a professor there. I was invited to give a talk at each of them on a bill of rights. My papers are at the University of the Western Cape. My heart and soul was there, as it was the university of struggle, the oppressed and the university that had fought hardest for the rights of the people. I had done my Bachelor of Laws (LLB) at the University of Cape Town. I was culturally very much associated with it. I had to speak to each group on a bill of rights, and it was so different. When I spoke to the black students, a bill of rights meant freedom, opportunities, changing society, a future and hope to them. The next day, I spoke at the University of Cape Town, with a small number of black students, but it was overwhelmingly white. The bill of rights meant to them that democracy is coming to South Africa and we are going to have changes, but we are not going to be driven into the sea, and we can go along with the changes. It was a very good discipline for me, because I could not have two versions of the bill of rights, with one saying to the black students, "Don't worry, people, everything will be unto you through the bill of rights", and then, the next day, say to the white students, "Don't worry, the bill of rights will protect you from being driven out of your homes and driven into the sea". It had to be a bill of rights for the nation, and I had to give, in essence, the same talk to both groups.

I do not know whether I was a storyteller before I developed an Irish connection, but I have become a big storyteller. Before getting on to the particular aspects of the South African bill of rights, I have a couple of quick stories. First, I was stateless for 6, 7 or 8 years in London, having lost my passport when I went into exile from South Africa. I applied for a British passport so that I could travel, and I was visited by somebody who was from the Special Branch. I wondered whether he was going into all the underground resistance work that I did in South Africa. He was very plausible, like someone you would see in a 'Smiley' movie, and very friendly. Suddenly, he said, "Mr Sachs, what do you think about the Queen?". I was astonished and thought, "Why is he asking me about the Queen?". I do not have very strong views. I happened to grow up in a family that was historically anti-monarchist in South Africa, but having the Queen was something that the British people mostly liked, even if some did not. So, why was he asking me that? I did not give a quick answer, so I must have looked very suspicious. I did not give an answer, because I did not have an answer or views on the Queen. Afterwards, I thought, "Why was he asking me that?". Then I realised that I had sat as a commissioner on an unofficial commission of inquiry into the shootings by British troops in the Bogside. That was before the Bloody Sunday event and was with Lord Gifford. I was then teaching law at the University of Southampton and was invited to sit on the inquiry. Sadly, my South African experience was useful because we had had many shootings into crowds in South Africa. I had been party to that report, so they must have wondered whether I had some special connections with the IRA. That is the first story.

Fast forwarding to 1988, I was in Lusaka and the African National Congress' (ANC) constitutional committee was having what was called an "In-House Seminar". I think that we must have been the only revolutionary movement in the world and in human history that had an "In-House Seminar", with a capital "I, H, S". It was on the constitutional guidelines for a future South Africa. My task was to explain to about 70 delegates — people from the ANC resistance army, uMkhonto we Sizwe, diplomats, students and people living in exile — why we needed a bill of rights in South Africa, and my heart was beating. There were about 70 people in the room, maybe three or four whites, some people of mixed descent, but overwhelmingly black African people who were in the struggle against apartheid, and my heart was racing.

I said that we needed a bill of rights for three reasons. The first was that it makes us look good. We were not bloodthirsty revolutionaries who wanted to seize power; we were speaking about a bill of rights that everybody agrees, OK. That was the tactical reason. I said that, fundamentally, it was our organisation's answer to group rights in South Africa. At that stage, the whole apartheid system was based not on rights for people but on rights for groups. If they were willing to move, even to have a universal franchise, they wanted to ensure that the outcome would be group rights. We would have had three presidents: one representing white and mainly Afrikaans-speaking people, who would have been de Klerk; one representing the majority of the liberation movement, who would have been Mandela; and the other the Zulu-speaking people, led by Buthelezi. They would have rotated their presidency and shared power.

Our answer to that was that we did not want power-sharing between racial groups and ethnic groups. That would simply give the whites a minority veto and would keep race alive as the foundation of citizenship in our country. We wanted a universal franchise and equal rights for everybody; protections would come not through power-sharing or consociationalism but from a bill of rights. A bill of rights, then, was central to our whole constitutional project. It was not an add-on like the American Bill of Rights, where, once they came together, they said, "OK, we will now protect these fundamental rights". It was constitutive of our vision of South Africa. It is no accident that, in our constitution, the bill

of rights comes before the structures of government. The whole early part of our constitution has the preamble, foundational principles and the bill of rights, which I will speak about in a moment.

I said that my heart was beating in that room, which was because people understood that a bill of rights was strategic for South Africa. My heart was beating because there was a third reason why we needed a bill of rights. We needed it against ourselves. We had seen people fighting nobly for freedom in Africa and elsewhere in the world, and they got into power and became authoritarian. I was worried because it was easy for me, a white lawyer — the term "bourgeois" was thrown at me — to speak in those terms. Would they repudiate me? I saw 70 people in that room with a look of delight in their eyes, because they were worried. We did have bad people in our ranks, and we had seen things that had happened in other countries. So, those three ideas about a bill of rights became central to our project of transforming South Africa from a racist, apartheid state into a non-racial and, afterwards, a non-sexist democracy.

My last story is about what happened three weeks after that In-House Seminar. I was blown up by a bomb in my car, and I lost an arm and the sight in one eye. I woke up in hospital and felt triumphant and joyous that I had survived. There is a moment that you wait for as a freedom fighter; when they come for me, will I be brave? I got through, and I felt triumphant. That was in 1988, and, to this day, I still have a bit of that triumphant feeling inside me. As I got better, my country would get better — that was the total conviction that I had.

After I had recovered, I set up a constitutional study centre in London. I had been recovering in a London hospital, and it was Mozambican doctors who had saved my life. One day, there was a knock on the door, and a very British voice said, "Professor Sachs, may I speak to you? I have just come from the Long Kesh prison in Northern Ireland. I have been in touch with the editorial group of the Sinn Féin publication. They read your book, 'The Soft Vengeance of a Freedom Fighter' and have had a very serious debate. Is it permissible for a freedom fighter to cry?". I was very moved by that. He told me that, by a majority of three votes to two, they decided that it was permissible for a freedom fighter to cry. It sounds like a very trivial thing, but, in fact, one of the three was Laurence McKeown, who moved towards negotiations and finding a settlement. The two, I think, were old-time militants who felt that it was not appropriate to cry. I say this because I have a very strong emotional, almost existential connection with Northern Ireland. I was delighted when asked to participate.

I have spoken previously — I think that it was at Queen's University — about a bill of rights for Northern Ireland. It was many years back. It might even have been before the Good Friday Agreement. A bill of rights, at that stage, was seen as a mechanism to enable Catholics to participate in public service and the police force and to gain entry to areas where they felt that they had been excluded. The bill of rights was seen very much as something for the loyalists, if you like, to be resistant to. I was thinking that it can be that — it must be for equality; it must be for breaking down the caste-like features of public life — but it can be much more than that. A bill of rights, if properly framed and understood, could be very protective to people who saw themselves as Protestants and allied themselves with Britain in an expression of their identity and culture. People could feel protected in their identity and culture, if they wanted to march and to play their whistles and bang their drums — it was part of who they were; they had grown up in it. If that could be done and it did not mean jobs, it did not mean the police force, it did not mean wars, but it just meant that that is who we are and we want to do it, people could be protected in that sense through a bill of rights. In other words, accepting a bill of rights did not mean being overrun or diminished; it meant opening up, not running away or being put into a corner.

Nobody was comfortable with the idea, at that stage, because the loyalist grouping still felt that a bill of rights would be hostile to them, and the republican — Sinn Féin — people felt, "We do not want to give them rights; they have been oppressing us all this time". However, nobody said that. I was visitor, and they were polite.

I really feel that you have an opportunity now to embrace the concept of a bill of rights that goes beyond simply clause 1, 2, 3 and 4 and protects you against this, that and the other, by using it in a way that can help people to feel comfortable in the country that they are in. It might be that — this is completely unsolicited, but I will offer it anyhow — a preamble could be as important as a text. Preambles are not things that the British legal system is very comfortable with. It gets beyond the strict letter of the law; it simply introduces the law. We found that crafting our preamble was exceptionally important for our constitution. We found that — I speak now as Albie the judge — the preamble played a very important role in interpretation. The preamble establishes the value system and, to a certain extent, the historical moment in which the bill of rights or the new constitutional arrangement is being established. If you can get a broad consensus on the kind of country that you feel comfortable living in,

it is best to have that in the preamble: "This is why we need a bill of rights. This is what a bill of rights can guarantee in the broad sense". It establishes a tonality, a framework and a vision that is comforting, reassuring and helpful. It means that you do not fight over every single word in the text because you are scared that, if you give way on this, somehow you will let your side down and will be diminished.

Did my colleague Kate O'Regan tell you about our two-stage process to constitution-making? We had an interim constitution and a final constitution.

The Chairperson (Ms Sheerin): Yes, she covered that in her presentation.

Mr Sachs: OK, so you will be familiar with that. The interim one was to get a constitution that would be drawn up by an elected body within a framework of principles agreed to in advance. It was a wonderful Assembly that drafted our final constitution. In many ways, it is held up as one of the most progressive constitutions in the world. Of the people in Parliament who were debating and arguing, half of them had been in jail, some had been in exile and many had been tortured. Many were from the other side — from the ranks of what we called "the oppressors". There were other people in the middle, with different faiths and backgrounds. Together, they drafted the constitution.

It has a number of features. In 1996, it was the first constitution in the world to include no discrimination on the grounds of sexual orientation. It was the first constitution in the world to constitutionalise environmental rights. It has a very exceptional section dealing with freedom and personal security. That was strongly influenced by the strong women's caucus in the constitutional Assembly that connected up freedom as absence from arbitrary restraint, in terms of detention without trial and so on, freedom from torture and freedom from violence from public or private sources. It was the first and may be the only constitution in the world that, in effect, prohibits gender-based violence as a constitutional matter, not simply as a criminal law matter.

It also includes freedom to make decisions on reproduction. Those are not women's rights; they are included as rights of freedom and personal security. It might be worth looking at and considering that. Personally, I feel that it is a very strong women's voice saying, "What are the things that make us, as women, not feel free?". The two big issues are violence in the home, on the one hand, and, secondly, not being free to make choices over reproduction. There are other clauses that relate to that, but that was a very interesting particular element.

We had a debate, and I remember that Kate was involved in it. I think that we were on different sides beforehand. The debate was about whether we should have a general clause in the equality provisions or we should specify. The academics — I think, including Kate O'Regan — wanted to have a general clause saying no unfair discrimination and to leave it to the judges to develop. I strongly resisted that. I said that vulnerable groups do not want to be dependent on litigation or Parliament. They might be unpopular groups, and their voices are often not very strong. They want to feel recognised and identified, particularly for their fundamental rights.

We have a very expansive set of equality and unfair discrimination rights. I will not read them all now. Well, maybe I can read them all now:

"Everyone is equal before the law and has the right to equal protection and benefit of the law."

Affirmative action is allowed. The grounds for unfair discrimination that is prohibited include:

"race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

I argue in favour of comprehensive statements like that, and they are not exhaustive. Such statements help to protect groups that otherwise might be left out. It does more than that: it gives a sense of dignity. I think that that is a major element of a bill of rights. It is not just about protections; it is saying, "Who are we as a nation? Who are we as a people? Who matter? Who count?". That is where the preamble becomes so important. I will read the opening parts of the preamble and the founding provisions:

"The Republic of South Africa is one, sovereign, democratic state founded on the following values".

Sorry, that is the constitution, not the preamble, which is:

*"We, the people of South Africa,
Recognise the injustices of our past;
Honour those who suffered for justice and freedom in our land;
Respect those who have worked to build and develop our country; and
Believe that South Africa belongs to all who live in it, united in our diversity."*

I suspect that the key issue that you face is being united in diversity and seeing that being united is not in conflict with diversity and that diversity is not in conflict with being united but that each — if properly managed — reinforces the other. It goes on:

*"We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to -
Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
Improve the quality of life of all citizens and free the potential of each person; and
Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations."*

Then, in the different African languages, it says:

*"May God protect our people.
Nkosi Sikelel' iAfrika. Morena boloka."*

At the outset, we had a debate about God and about placing "God" in the text. I, who is very secular and has fought for my right not to pretend to hold a belief that I do not, was the one who suggested that we include "Nkosi Sikelel' iAfrika" and "God bless South Africa", because it is the hymn of our people, the hymn of struggle and is a unifying thing. It brought the nation together.

I do not know whether that is within your remit, but, if it is, I encourage you to have something similar that people can pick up and read and say, "Yes, yes, yes, yes. I am included, and I am covered by that. We have this because we are tired of the conflict and the pain and we have to live together. We really want to get on together, respect one another and allow people to be different in Northern Ireland", or wherever it is. They should be able to say, "These are the things that we want and desire, and we have to find some ground rules that can unite us". Something of that kind would be really helpful.

Then we have something unusual in our constitution: the foundational principles. They are not in our bill of rights, and they are not in the preamble. They are called "founding provisions", and they state:

"The Republic of South Africa is one, sovereign, democratic state founded on the following values:

a. Human dignity, the achievement of equality and the advancement of human rights and freedoms.

b. Non-racialism and non-sexism.

c. Supremacy of the constitution and the rule of law.

d. Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

So, you have your preamble, foundational principles and then the bill of rights. Each is in a separate section, but each is at the beginning of setting out our constitution. They are not just words. Sitting up on the court, we found these principles exceptionally helpful in interpreting the use and abuse of powers, the constitutionality of state conduct, the extent of the law, the limitations to laws and so on. It did not depend on the background of a particular judge or which side of the struggle you were on; we had a common textual foundation and a set of values that we could draw on in order to create a new jurisprudence, if you like, from those values.

I will conclude by talking about some of the other features of our bill of rights. There is a very strong section on children's rights. Again, we had people pushing hard for that. It includes not only the right not to be abused and to have your interests taken account of but the right to develop, be respected and to have a name and identity. That is really strong.

In South African conditions, the land question was vital. Apart from the rights to a fair trial, which are very extensively set out, the second-longest provision in our bill of rights deals with land, restitution of land and compensation for land. It is very specific to South Africa. We have just administrative action as a constitutionally protected right. I hope that Kate O'Regan spoke about that. It is not often in a bill of rights. A right to information is in the bill of rights. It is so important for the exercise of other rights to have a guaranteed right to administrative action.

Finally, very extensive social and economic rights are included. We drew to some extent on the Irish constitution, which includes social and economic rights but makes them directive principles that are not enforceable. We made them enforceable. They have played a very important role in our society, and jurisprudence is developing all over the world. Social and economic rights, particularly health rights, are very strong in Latin America, and rights of indigenous people, rights of migrants, the right to education and the right to food are all included and have become a very important part of the work of the courts in ways that do not detract from the role of government to govern, raise taxes and spend the money well. There are certain core principles that bring the courts in through the progressive realisation of rights within available state resources. You do not go to court to say that you have a right to a school place or to a hospital bed under the constitution, but you have a right to call upon the state not to diminish those rights where they exist and to facilitate advancement to rights where they do not.

I am finishing my presentation now. Those rights were vital in the Treatment Action Campaign case, where our Government were refusing to roll out access to antiretrovirals on a comprehensive basis to women who were living with HIV and about to give birth. Nevirapine reduced the transmission of the virus by 50%; now it is by 95%. The Government said that they had to experiment in two sites in nine provinces only, and we said that that was a violation of the rights of access to health. That transformed the whole approach of the Government to antiretrovirals. We now have the biggest antiretroviral programme in the world. The courts, in that sense, upheld something that dealt with human dignity, and we found that the theme of human dignity is the one that links the preamble, the foundational principles and the bill of rights. More than freedom and more than equality, human dignity is the central notion.

The Chairperson (Ms Sheerin): Albie, thank you very much for that. I am sure that everybody will agree that that was really interesting.

I will begin with the first question. You referred to your time in Ireland, and you obviously have a bit of knowledge of the conflict situation that we had here. I am getting from you that you feel that a bill of rights was a very important factor in ending the conflict in South Africa. What advice do you have for us here? We are in a situation where we have had a peace agreement in the North for 22 years, and a bill of rights at that stage was set out as something that we would have, but we still do not have consensus on one. This Committee has been set up to consider the creation of a bill of rights, and there are some who do not feel that a bill has merit. What advice do you have, and how worthy do you feel a bill of rights is in a post-conflict situation?

Mr Sachs: I say that you should go to people and say, "What do you want? What are you scared of?" and then ask, "How can we find common language?". It is partly about getting people to feel involved in the process of getting the bill of rights. When I say, "What are you scared of?", I do not mean what those people are scared of in a bill of rights; I mean what they are scared of living in this country. What oppresses them, what, in the future, are they fearful might happen and how can we guard against that? It is then for people to really think of one another as human beings and to acknowledge the fears of others.

In our case, it was often quite hard for black people to acknowledge the fears of whites, who had been oppressors and who had behaved often in terrible ways by taking the land, insulting people, oppressing the languages and in all sorts of ways, and now they wanted a bill of rights. The feeling was that they wanted a bill of rights because they wanted to hang on to everything.

Those of us who were struggling for these notions, and, fortunately, we had the support of our leadership, said that the whites are also oppressed by their history and past; they are trapped in a narrow vision of things. We said, "They are human beings, and they want their language, their culture,

their beliefs and to be able to go to church on Sunday and worship in the way that they have always worshipped". OK, OK.

It is almost about starting with the very simple things and then distilling out of that the texts. You do not start with the texts and say, "Are you happy with this or that?". You start with the human heart and the human soul, aspirations and fears and then try to distil something out of that.

When I spoke to ex-political prisoners about 15 years ago, I found that it was extraordinary. They were all in one room, and I could not tell the difference between the republicans and the loyalists. They all seemed to be tough, working-class Northern Irish men, and they were so similar in body language, humour and interaction, yet they had been trying to kill each other, literally, and to blow each other up, and here they were in the room. There was also almost a strange connection between them. They had all suffered. They had all been in prison, even on different sides, but I felt that the connections between them were very strong. It is about trying to find those connections between people and to build on that.

The Chairperson (Ms Sheerin): Essentially, you are saying that there is a very human thing at the end of it, and it is just about finding the commonality and what connects us as two, three or four sides of one community.

You referred to the preamble and to how important you think that it is. We are in the process of potentially doing a public consultation on a bill of rights and reaching out to the public and asking what rights mean to them. How do you think we can effectively set out the context of that? Is it worthwhile? What way should we do it in order to get the views of people correctly?

Mr Sachs: I am very strongly in favour of a preamble, and I urge you to have one. You could come up with a text or alternative texts. That would establish the tone, direction and feel of it, and it would locate it in your history and explain why, in a sense, it is so important to have that document. It is not just for when you are in trouble, you are feeling that you have been treated unfairly and you can go to court; it is more about saying who we are as people and as human beings who have been in conflict and who are tired of the conflict, and it is about saying that we want to establish the commonalities that people on the different sides could identify with and say, "Yes, I am recognised in that".

I was very saddened when I went to Long Kesh. The idea then was to do what we did in Johannesburg. We converted the Old Fort prison, where Gandhi, Mandela and others had been locked up, into the site of our constitutional court. That was very powerful. We wanted to do something similar with Guantánamo Bay, but, for various reasons, that failed. Could that be done with Long Kesh? Long Kesh is a site of pain, resistance and survival, if you like, where republicans and loyalists had been locked up. People could go there, respecting the suffering of the past while getting beyond it and being transcendent. However, it seemed that the council was not emotionally ready for it then. It could be a wonderful tourist site and a site of reconciliation.

It is about finding those commonalities in the language, the tone and the setting for what follows and then asking people to write what they would like to be in the preamble so that they can feel proactive about it. You might ask people, "What are your views on same-sex relationships?" or, "What are your views on other areas that have caused controversy?". That is all useful, but it is most useful to get people to start identifying, from the very beginning, with a preambular text.

The Chairperson (Ms Sheerin): That is helpful.

I have a final question. South Africa protects cultural rights, and you referred to the importance of that in our context. How important would it be for us to have something on linguistic, cultural or heritage rights?

Mr Sachs: I should have spoken about that, because united in our diversity, that tension runs right through our constitutional structure. Our first objective was to bring the country together from the divisions of apartheid, the Bantustans, separate areas, segregation and group areas. We had to have a united country, so unity comes before diversity.

Diversity was apartheid and separateness. However, it is unity not through compelling everybody to subordinate themselves to a single theme or stream into which they have to assimilate; it is unity across difference, a unity that allows for a multiplicity of political views, languages, religions and beliefs. That is strongly expressed in our bill of rights.

We had a separate clause dealing with language rights. It is not in our bill of rights or the foundation principles, so maybe that is a fourth element. We have 11 official languages. Those are disaggregated into languages that are used at national, provincial and local level. We then have languages in education and languages that are for broadcasting in different areas. We have languages that are used by communities that do not have an official status but that have a right to be developed. Those include four or five languages of particular communities of Indian, Italian, German and Portuguese origin. Sign language is protected in our constitution, as are three languages of religion: Sanskrit, Hebrew and Arabic. That is a comprehensive clause. We set up a pan-South African language board, which does not represent delegates from each language but which has the view to ensure that there would be multilingualism and across-the-board provisions. That ought to be looked at.

I did some research when in London before going back from exile. I went to the Minority Rights Group, and Cedric Thornberry was its head at that stage. I was very puzzled because I felt that I identified with everything that they were saying except that in South Africa the minority were the whites, who behaved like a majority, and the majority were the blacks, who were treated like a minority. So, protecting minority rights in South Africa would mean protecting white privilege, which we could not go for, but we could protect the Afrikaans language, the Dutch Reformed Church and the religion. I discovered then that, in the United Nations section, there was resistance to strong protection of minority rights as such. Many from Latin American countries were worried about indigenous groups breaking away. That was several decades ago. Opinion has changed since then on the right of people to associate and to come together to use and develop their language, their culture and their religion, and that is very clearly expressed in our constitution.

There are quite extensive rights relating to religion. There is one section relating to conscience and belief that also provides some acknowledgement of well-established religions being able to, in the national sphere, have a certain sphere of autonomy in practising a religion as well as family law and other such areas.

The Chairperson (Ms Sheerin): Brilliant, Albie. Thank you very much. I am sorry to have to do this. We have lost Mark H, so if everyone does not mind staying on the call, we are going to suspend for a couple of minutes to see whether we can get him and Mike, who is apparently joining us at 3.00 pm. We cannot take any more questions until then.

The Committee Clerk: No. If we suspend, we can try to get him back.

The Chairperson (Ms Sheerin): Albie, I am really sorry about this, but are you OK to hang on for a couple of minutes?

Mr Sachs: You would have to close it down to shut me out.

The Chairperson (Ms Sheerin): *[Laughter.]* I thought that you could not understand my accent; I was worried there. We will suspend the meeting for two minutes.

The Committee suspended at 2.57 pm and resumed at 3.03 pm.

On resuming —

The Chairperson (Ms Sheerin): We are live again. Michelle, do you have any questions for Albie?

Miss McIlveen: Thank you very much, Albie, for the presentation. I will follow on from the Chair's initial question about consensus. Last week, we received a very interesting presentation from Dr Amanda Cahill-Ripley, who carried out research amongst Protestants along the border and their perceptions of human rights. She states that, contrary to public perception, the Protestant/unionist community is not opposed to the idea of human rights. Their issue is primarily in relation to the way in which rights are perceived to have been implemented in practice, along with how they have been framed in political discourse in the past and their association with being perhaps more pro-republican or anti-state. Therefore, while I appreciate the comments that you have made — you talked about having a common language in order to bring people on board — we are really working against that type of context. What is your advice on that?

Mr Sachs: If you can shift the enquiry away from, "What do you think about human rights and a bill of rights?" to, "What do you want, what are your concerns, and what are those things that are so

important to you that you feel they ought to be protected?", then you end up with the rights. Rights are therefore not seen as a weapon that is used by the other side or which threatens you. It is about framing the enquiry a little bit differently.

Miss McIlveen: OK. Looking at your own circumstances in South Africa, to what extent has there been tension between individual rights and the rights of groups and communities? At the beginning of your presentation, you referred to group rights as opposed to individual rights.

Mr Sachs: In South Africa, we have a concept called ubuntu. I do not know whether there is anything similar in the culture in your part of the world. Has that term ever been used with you?

Miss McIlveen: Sorry?

Mr Sachs: U-b-u-n-t-u. It is very strong in African culture. Basically, it says that, "I am a person because you are a person. I strengthen my humanity if I acknowledge your humanity." It is a theme of interdependence. The term was used in the epilogue to our interim constitution that helped to set up our truth and reconciliation commission. I mention it because the concept of ubuntu helps to reconcile the individual rights of autonomy — personal autonomy and individuality — with the collective rights of the community. Instead of being hostile, those rights are seen as mutually supportive.

Therefore, when we talk about human dignity, equality and freedom, it means that freedom is not seen as the right to be on your own to do what you damn well like with your property or money provided that it does not injure others. That is far too limited a view of freedom. Our view of freedom is that you enjoy and nourish your freedom and exercise it in groups in relation to, and working together with, others. What we did not like about group rights was not that they were collective in nature. I did not mention that we had very strong workers' rights, because workers had fought very hard against apartheid and for change. We have a number of strong provisions. We do not have women's rights, as such, in the bill or rights, but a gender-sensitive approach to all its elements. Seeing women as half, or a little bit more or a little bit less than half, of our community and society, who, historically and in practice, have been subjected to particular forms of marginalisation and wrong can be understood only in that collective historical sense.

Children share difficulties as children. It is not a view that is hostile to looking at rights in a collective way. It is seen as getting the correct balance between individual autonomy on the one hand and the fact that you develop your autonomy in a collective setting through schooling, community, neighbourhood, language, associations, literature, music, and all sorts of ways, on the other. My approach has been that dignity is the connector. So, instead of having a purely libertarian approach or a purely communitarian approach, I argue for a dignitarian approach that links the libertarian and the communitarian.

The Chairperson (Ms Sheerin): We will go now to the members who are linked to us via StarLeaf. Mike is the Deputy Chair. Mike, do you have any questions? I know that you did not catch the oral brief, but you probably have the written brief.

Mr Nesbitt: I just want to say hello, Albie. I met you many years ago when you were in Belfast for an event run by the Arts Council. You talked about the physical history of the constitutional court, which resonated with me because we have an old courthouse on the Crumlin Road in north Belfast that we could develop along similar lines.

How important is it to begin a bill of rights with a preamble that sets out your vision for what you want for all the people of the country, based on values, such as human dignity, equality of opportunity, or ubuntu, as you call it where you are?

Mr Sachs: I would not say that it is important; I would say that it is fundamental. It is crucial. It is the springboard for everything that follows, but you have to get the right language. It must not be legal language. Legal language can be very sterile, cold and impersonal. That is part of the strength of legal language, but this is not an insurance document. This should probably have a poetic ring to it and a sense of humanity. It has to reach the soul as well as the mind. It is not easy. It does not have to be all flowery, [*Inaudible*] and airy, but it must not look like the beginnings of an insurance contract or agreement.

Mr Nesbitt: From that flow the rights that you are going to enshrine in statute.

Mr Sachs: I am not hearing you very well.

Mr Nesbitt: OK. That is perfect. Thank you very much.

Mr O'Dowd: Albie, that was a very interesting presentation. What struck me most about it was when you talked about the presentation that you gave to your ANC comrades, and you were nervous about it. I think that I am quoting you right when you said, "We needed the bill of rights against ourselves". That, to me, is fundamental because those in power fall from power, majorities turn into minorities and the world evolves constantly. Even as elected representatives now, we have a certain amount of power, and we need to protect against the abuse of that power.

You talked about convincing those who are sceptical about a bill of rights or who see it as a loss and a victory for the other side. You talked about the use of language and about reaching out to people and engagement. We have been doing this for 22 years, and there have been political reasons and, sometimes, immovable objects that resist you when you are trying to make change, but unless we convince people, I fear that this project will go on for another 22 years. This may be more about seeking advice than asking about how we continue this journey.

Mr Sachs: I am not a republican, and I am not a loyalist; I am Albie from outside. I am speaking to loyalists and saying that a bill of rights will protect them. It will enable them to be who they are and who they want to be. I would tell them that, I assume, they do not want to be a bully or to beat people up, and that they will not want to get a job because they are of a particular faith. I would also tell them that they will want to get on with their life, have their festivities and recognise their ancestors, and others, and so on, and that a bill of rights will give them that right. It will not be an act of grace, because it will be a cultural right. It might require the setting up of agencies or institutions to ensure respect for things of that kind.

It is always useful to draft the provisions of a constitution when the competing parties are roughly equal in electoral terms: if one side is completely in power, it will want to hang on rather than surrender power. However, if you do not know how it is going to turn out, that is a good time. You feel that this is going to protect all of us, on all sides.

It is not only that majorities become minorities. Sometimes, bad things happen to the most wonderful people. We have had bad experiences in South Africa of noble people who were in prison and who fought for freedom but who, sadly, according to all the evidence, became very corrupt. A bill of rights represents that set of standards. It is not dependent on individuals; it does not presuppose that every president will be a Mandela. It is there. It is the kind of world — the norms and the standards — that people such as Mandela wanted to create. That is why I suggest that you change the discourse and nature of the enquiry to get people to come up with their anxieties and hopes and the sort of things that can make them feel, "Yes, I am living in this part of the world. I am not being unduly disturbed. I am getting on with my life and am free to feel the way I am".

It might be how they worship on Sundays or how they march. Marches have become so symbolic. You do not prohibit the march; you change the sting of the march, its meaning and associations, but you allow people to celebrate their form of identity. I am putting my foot in it now, as I do not know which side you are on. I have my intuition, but that does not matter. The starting point should, therefore, be different. It is to make everybody feel that it is their constitution and that they have their rights and are respected. It is not a weapon to be used against them.

Mr O'Dowd: I am on the side of a bill of rights. You have summed it up. I started the conversation by saying that we need a bill of rights against ourselves. That is why I favour a bill of rights. Thank you very much for a very interesting presentation.

The Chairperson (Ms Sheerin): Thank you, Albie, for being so accommodating with our technological hitches. I believe that you want to stay on to listen to Baroness Kennedy's presentation. The team will move you into the audience. Thank you for your time; I appreciate it.

Mr Sachs: When does she start?

The Chairperson (Ms Sheerin): We go to her presentation now.