

THE DOCTORS FOR LIFE CASE – VIDEO TRANSCRIPT

CHAPTER: DIALOGUE AND DELIBERATION AS THE ESSENCE OF DEMOCRACY

THANDI MATTHEWS

Can you speak to me a bit about how you envisioned participatory democracy in our processes of governance?

JUSTICE ALBIE SACHS

It cropped up in a very specific case. Doctors for Life, we called it, the DFL case. Doctors for Life were an anti-abortion group, set up by people - Catholic, very family oriented, and challenging the provision and the extension of abortion services to people in South Africa. And they came to our Court to complain that a law had been passed, and signed into law by the president. It dealt with a number of different medical matters, and one of them dealt with the question of termination of pregnancies. And I think the main effect of that particular law was to enable well-qualified nurses to do abortions, terminations - it didn't have to be a doctor doing it - under various circumstances of control.

Their complaint was a procedural one, and they said they'd gone to Parliament when the law was being discussed in the first place. They'd made their representations in the National Assembly, and the National Assembly hadn't accepted them, and had produced a bill which was then sent to the National Council of Provinces. So, we don't have a senate in South Africa, we have a National Council of Provinces, and it's modelled very much on the German Bundesrat, where the second chamber is not directly elected or chosen.

It consists of representatives of the provincial legislatures, in Germany it would be the Länder, in South Africa, the provinces, and each province sends a certain number of people, and then they vote on the laws. And the idea of that is twofold – interconnected - one is to ensure that the views of the provinces are heard at the national level, and taken account of, the other, is the other way around, to get better implementation at the national level, because the provinces have already been involved.

CHAPTER: COOPERATION BETWEEN LEVELS OF GOVERNMENT

And it fits into the whole notion of cooperative governance between different levels of government. And that's the way we have our upper chamber. In any event, Doctors for Life said, *'We wrote to the National Council of Provinces saying, we want to be heard, we've got something to say, please listen*

to us.' And the NCOP said, *'Fine, we're having hearings in Cape Town on such and such a date. But, oh, no, no, no, it's not necessary for you to come here,'* they said, *'we are coming out to the provinces. You don't have to come to us.'* So, Doctors for Life are waiting, waiting, waiting. And then the next thing, they see the law's being passed. So they say, *'We were promised a hearing. We didn't get a hearing.'*

Now, the issue wasn't whether or not that hearing would have made a difference. They had had a hearing in the National Assembly. The Constitution expressly includes in its Freedom Clause, the right of people to make decisions on reproduction. So, it's a very strong Constitutional authorisation, if you like, of abortion, if that's what people want, if that's the decision that people take. But they're saying, *'You don't have to hand it over to nurses. We want to make representations on that. So, we want the law struck down, because we were promised a hearing, and we didn't get a hearing.'*

I remember looking at this and saying, *'Oh, that's pretty far-fetched.'* You know, they were given a hearing, and they relied on a provision in the Constitution that says, *the legislature shall take reasonable steps to ensure public involvement in the making of laws.* And they say, the legislature failed in that respect.

CHAPTER: THE RESPONSE FROM THE GOVERNMENT

The response from the government, *'We took reasonable steps. They had the opportunity. It wouldn't have made any difference. The law was passed with all the requisite majorities and the courts had no authority to intervene.'* And we had very, very serious discussions. And my first view was, okay, this shouldn't have happened. It's not good government, but to strike down the law when it's passed through all the proper processes, and there was public involvement, the text of the bill was published, I think, there's a white paper and a draft text and people could come to the portfolio committees and make representations. Lots of publicity, lots of occasions, the public could sit in the galleries while the law is being discussed and debated. So, there has been public involvement.

We discussed around the table, and it's a strong feeling, public involvement, that's part of participatory democracy. Democracy is not just free and fair elections, every five years you elect the parliament, and then the public forget about it for the next five years. We got our Constitution through constant public involvement at different stages.

We have traditions in South Africa, we speak about the bosberaad, indaba, the lekgotla, it's so much part and parcel of the character of the South African society, drawing everybody into discussions. And so democracy is much more than just voting every five years. And throughout the world there's been a certain... I'd call it disenchantment... with reducing democracy to regular voting and free and

fair elections. That as though the populace remains inert in between elections. And then the cynics say, *'They promise us everything. We have the elections and then they forget about us.'* So, it requires a lot of reflection and reconsideration. And I'm persuaded now that it's not enough simply to say, *'Naughty, naughty, don't do it again.'* They'll do it again! And it was parliamentary pressure of time for voting. There's always parliamentary pressure. There's never enough time to get everything done in the calm orderly way that you want to do it.

So I'm persuaded now, and it was Sandile Ngcobo who was really...it was almost...I'd call it heroic in a judicial sense. We looked around the world. We couldn't find a single other country where legislation duly adopted with the requisite majorities and notices and so on, by the parliamentary processes, had been struck down for failure to involve the public. And we felt it's not enough just to say you have open hearings involving the public.

CHAPTER: MEANINGFUL PUBLIC PARTICIPATION

The public must be able to engage in a way that is meaningful. What was very powerful for me was [that] it wasn't only the Doctors for Life issue that was at stake. It's very unlikely that any further representations on their behalf could have made the slightest bit of difference.

They had already made the representations earlier on, it would be the same thing. And the second law that was passed, was a very technical one, dealing with the organisation of dentists. So, nothing to add on that. But the third law was a law to allow for the recognition of traditional healers, that was big in South Africa, very, very, very, very big, and very complicated. Traditional healers, maybe to this day, the majority of black African people, their first port of call will be traditional healers - they go to the state for regular medicine as well - exceptionally meaningful to millions... rural people, poor people, not only middle-class people, but professionals as well. And until now they've been treated as charlatans, as crooks, as obscurantist people relying on superstition to get money, in a very negative way, with hostility from the scientific medical profession generally.

And now parliament is saying no, traditional healers play a big role in black society. They're very meaningful to millions who regard these people as doctors, as medical people who can help them with spiritual and physical ailments. And instead of marginalising them, we would like to have a form of public acknowledgment of the role that they play, that gives them professionally certain protections, that maybe makes it possible to ensure certain standards are being maintained and there's no exploitation.

In any event, it's to come in out from the cold. And for me that was exceptionally meaningful. Actually, for me, Albie, it's complicated. I grew up in a world where we were fighting superstition and

backwardness and underdevelopment, and the enlightenment must come, and science must come. So, I'm not intuitively friendly, if you like, to traditional medicine. My late brother was a doctor, trained in the scientific methodology, and again, very keen on social medicine, on preventative medicine, on community medicine, medical care in that way, but not sympathetic to traditional medicine.

CHAPTER: GIVING ALL IN THE NATION A VOICE

So, I've got to overcome my own reservations, if you like, personal, and see the people concerned - South African citizens, South African people, who play a big role in our society, a very diverse society with multiple beliefs and ways of organising things and dealing with pain, physical pain, emotional pain. And I'm seeing this now as something of a breakthrough, and I'm thinking to give a hearing to Doctors for Life who can fly to Cape Town, and have their representatives speak there. Okay, That's good. That's right. They're part of the nation. They have the right to be heard.

But it's particularly meaningful for the outlying groups, the marginalised groups. And traditional healers are... you can't be more local than that. It's local waters and local rivers and local stones and local bark. There's something very, very indigenous in that sense, to the nature of the methodologies that they use, the points of reference that they use, and the idea of Parliament consulting them where they speak in their own language, in a comfortable local environment, is ultimately, profoundly democratic, and particularly meaningful in our society. So, the words I used there are for people destined to secrecy, not to be heard giving them a voice ... have a very, very special meaning.

It also says something profound about the nature of our democracy. The lobby groups for powerful institutions, political, professional, economic, faith and so on, are very strong. They're organised, and they're represented in the political parties, and they have a voice. But there are so many people in our country who don't have a strong political voice, but who need the protection of the law, maybe even more so than those who have a strong political voice. And the idea that democracy consists simply of elections every five years - I think I used the image of Sleeping Beauty - is kissed alive at the end of five years and goes to sleep for another five years... that's not the nature of our democracy. The nature of our democracy is ongoing, a very pluralistic, very respectful of the variability and multiplicity of views, and very eager to give a voice to make the people on the ground in the different areas feel listened to and respected. It strengthens democracy and it strengthens formal democracy. The two are not incompatible with each other.

We fought for the vote. It was central to the constitution of our nationhood. We want the vote. The vote is important. We can't be cynical about it. But that's not enough. That form of accountability, electoral accountability, is not nearly enough. There has to be constant give-and-take interaction, and so I wrote very strongly on that in my concurrence with Sandile Ngcobo.

I think I contributed some ideas and phrases to his judgment, the judgment of the Court as well, and I think it's a signal judgment - for the world. Maybe in advance of many other democratic countries in the extent to which it acknowledges the close interrelationship between formal and participatory democracy.

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