

# Chatting With The Founding Fathers

by Gail Starling Marshall

Many of us have fantasized about having personal conversations with our Founding Fathers, asking, for example, Mr. Madison what he meant by “a well regulated militia,” or Mr. Jefferson where he thought our bold experiment in government would be in 200 years. We are left, in the end, to rely on scholarly speculation or costumed impersonators for such conversations.

But visiting and talking with the legal community today in South Africa is just such an experience, and in *real time*. Those who fought the peaceful revolution that resulted in an entire shift of political power to the 85 percent of the population who were previously disenfranchised, and who conceived and wrote a radical bill of rights that includes not only liberties but socio-economic rights as well, who wrote the blueprint for an entirely new government that includes extensive land and economic reparations for past injustices, and who implemented a system of truth-telling and reconciliation in return for amnesty for past human rights violations—they are alive and well and eager to talk. The experience of sitting at the feet of such men and women, the Founding Fathers and Mothers of the new, six-year-old South African nation seems akin to traveling by time machine to our own country's birth.

Eleven lawyers from around the United States (including myself) were part of a recent delegation to South Africa sponsored by People to People, an Eisenhower program established in 1956 to facilitate interchange between groups of Americans with their professional counterparts in foreign countries.<sup>1</sup> As is probably experienced by most groups of this kind, we from the United States found there was at least as much, if not more, to learn than to teach.

Meetings with three branches of the Judiciary gave us clear insights into the incredible challenges of the new legal system. The High Court consists of the general jurisdiction judges who are on the front line of legal interpretation and application. In a remarkable frank discussion with 12 justices of the High Court of Capetown, we learned of the unique issues and challenges facing these trial courts. In the first place, the new constitution designates eleven official languages<sup>2</sup> (plus sign language), and each provincial government is required to conduct business in at least two official languages. We attended trials conducted in English next door to trials conducted entirely in Afrikaans. All of the judges are bilingual and many are trilingual. Each litigant has the right to proceed in English, Afrikaans or one of the tribal languages such as Xhosa or Zulu. Decisions are reported in either English or Afrikaans, although there is a movement towards unifying under English, as English is strongly preferred as the second language by the black population.

Not only is the plurality of languages a judicial challenge, but there is also a plurality of laws. While South Africa does not have the dual sovereignty system of federal/state that we have, their new

constitution recognizes not only the previous common law (based on Dutch/Roman law) but also “customary” or traditional law, also referred to as tribal law. In a recent case, the High Court had before it a claim under the constitution of a woman objecting to the tribal rule that women could not take under intestacy. The Constitution assures equality of the sexes as a fundamental right. The High Court ruled against the plaintiff, partly on the ground that the claim preceded adoption of the new Constitution, but conflicts like this will no doubt arise in future cases.

One of our most interesting sessions was with Judge Antoine Guildenhuis, a judge on the newly established land claims court in Johannesburg. The new constitution gives those who were dispossessed of their land the right to file a claim for the recovery of that land, or, if that is not feasible, for alternative government-owned land or compensation.<sup>3</sup> The cut-off date chosen was 1913, when the government officially adopted a policy of apartheid and began moving tribes from long-held land into government-designated “homelands,” while displacing some whites who were living in the newly established homelands.

How can a government possibly carry out such a vast program of land redistribution? Amazingly it is in fact occurring and, for the most part, in a way that clearly is the preferred *modus operandi* of the South African people—by negotiation and consensus, rather than through litigation. For example, the Makuleke community lay claim to 20,000 hectares,<sup>4</sup> which had been taken from them by the apartheid government in 1969. A serious complication arose from the fact that this property consisted of a large portion of the country's most famous wildlife preserve, Kruger National Park. Naturally, this claim pitted various governmental departments against one another. This included land affairs, which was charged with fulfilling the constitution's promise of land restitution, and environmental affairs and tourism, charged with preserving public resources and promoting tourism. The South African Defense Force had its own interest because the land bordered Zimbabwe and Mozambique, a strategic border for defense and for control of illegal immigrants. An ingenious settlement was reached whereby the land was deeded to the tribe with an easement to the park for continued park operations, the concessions for which (game lodges, restaurants, museums) will be owned and operated by the 2,500 Makuleke families. The tribe was so pleased that it agreed as part of the deal to deed 5,000 hectares of its own adjoining land to the park, thereby enhancing and preserving an even larger area for the public and the environment, while providing significant economic opportunities for the tribe's members.

This is not to say the task is complete. The vast majority of claims (63,000 out of 70,000) are still unresolved. The land claims court, originally set to exist for only four years, has already had to be extended, and President Mbeki has called for the speeding up of land reform to forestall tensions between commercial farmers and the thousands of landless farmers.



The author is shown in the Constitutional Court Building in Pretoria with other members of the People to People delegation and (center) the Honorable Albie Sachs, Justice of South Africa's constitutional court.

Moreover, new and difficult legal issues arise daily. For example, Judge Gubbins spoke of a pending case in which land is claimed by three separate tribes, each claiming that it was the true owner and that the other two lived there as invited guests. To whom should the land be returned? In other cases of which he spoke, the constitution's deference to tribal or customary law when it is not in conflict with national law is implicated. When, under tribal law, the chief holds land for the tribe, will the court award restored land to the chief? To individual tribe members? To a trust on their behalf? Additionally, since actual title is not required and persons can claim land if they were dispossessed after occupying it for ten or more years, how is the court to deal with nomadic peoples? Do nomadic peoples moving among waterholes ever "occupy" land? Add to this the fact that the indigenous peoples in South Africa (unlike in the United States or Australia) are a majority (75 percent) of the population, and their claims are not based on treaties or statutory law, but on the constitution itself. From Judge Gubbins' thoughtful demeanor and quiet resolve, we were left with a sense that while the judiciary fully recognizes the enormity of its task, they are optimistic that it can and will be done.<sup>5</sup>

We were privileged to meet also with Justice Albie Sachs, a member of the newly-created Constitutional Court. Mr. Sachs, a native white South African, had been a lawyer fighting the apartheid government. During the previous regime, his law office had been ransacked without a warrant, and he had been subjected to detention without charge, under the regime's 90 days' detention statute. Later he was car-bombed by the South African Security Police, and the detonation resulted in the loss of his right arm. (Justice Sachs has written about this in *The Soft Vengeance of a Freedom Fighter*.) In his typical understated wit, Justice Sachs referred to his as "an unusual c.v. for a judge." As one of the authors of the new constitution ("Original intent? Our founders are still alive, and some

are on this court!"), Justice Sachs now sits on the court to interpret and enforce its promises, but also, in his words, "to remember all of that—the pain, the struggle, the hope." Truly he knows, as few judges of our country do, the pains of excessive police power and the scars of incarceration. He, like many others we met, is consumed by an indomitable spirit of optimism: "Despite the inequalities there is a basic sense here of governmental fairness and decency that reaches to everybody."

The South African Bill of Rights includes many specific socio-economic rights as "fundamental," including the right to education, the right to decent housing, the right to an environment that is not harmful, etc. Re-entry into the world trade arena after years of international boycott, plus an unemployment rate exceeding 40 percent, make realization of such rights a fiscal, as well as a legal and political, challenge. Such rights are not of constitutional stature in our system, and thus, it was at first surprising,

but later understandable, that the precedents looked to by the South African courts are more likely to be from India and Canada (with similar constitutions) than from the United States. Justice Sachs is, however, a well-read student of our legal system and can quote at length from his favorite American jurist, Justice Jackson. A tour of the court's library revealed a full set of federal reporters and even a current issue of the *Virginia Law Review*.

One cannot summarize the legal climate in South Africa without mentioning the remarkable ability of most of the population to forgive and move on. In *No One to Blame*, George Bizos, one of the lawyers who defended Nelson Mandela, and with whom I was privileged to visit while in South Africa, tells the story of a meeting of revolutionaries called to consider what retribution should be called for against the crimes of the apartheid regime. Albie Sachs raised his stump to be called on and said simply, "If I can forgive, so can all of you." The country chose a Truth and Reconciliation Commission headed by Bishop Tutu<sup>6</sup> rather than a War Crimes Tribunal. Perpetrators who confessed fully and truthfully to their crimes were given amnesty. Victims and victims' families were, in turn, given answers and, for some, closure to their tragedies. The ability of South Africa to have a radical change in political power in a virtually bloodless revolution, in contrast with the experience of neighboring African countries, is due in no small part to extraordinary leaders in the right place at the right time—Tutu, Mandela, Bizos, Sachs, and many others. It is also due to some national character that seems to seek compromise and consensus rather than all-out victory.

The power to forgive and yet remember in a constructive way is nowhere, for me, better illustrated than in a piece of artwork hung in the halls of the constitutional court. This piece of art consists of a ladies' evening gown stitched from bright blue plastic bags. In the Truth and Reconciliation Commission hearings, the parents of

a young woman who had disappeared learned that, as they had feared, she had been taken by the police, interrogated and killed. A policeman testified that they had required her to be nude for four days of questioning and she, in her modesty, had fashioned pants from a stray plastic bag to cover herself. This policeman was able to locate the grave for the family and the young woman was still wearing the blue bag. The artist has commemorated that young woman and, on the blue plastic gathered skirt, she has written in script the following words:

Sister, a plastic bag may not be the whole armor of God, but you were wrestling with flesh and blood against powers of evil . . . Your weapons were your silence and a piece of rubbish. Finding that bag and wearing it until you were disinterred was such a frugal, commonsensical, housewifely thing to do. A feminist act . . . For at some level you shamed your captors, and they did not compound their abuse of you by stripping you a second time . . . Memorials to your courage are everywhere. They blow against the streets and drift on the tide and cling to thorn bushes. This dress is made from some of them.

There is much we can learn from the founding fathers and mothers of the new South Africa. Not only their lawyers and political leaders, but even their artists and martyrs, speak to the visitor with both immediacy and eloquence. ♪

**Gail Marshall** practices law in Rapidan, Virginia, where she is also town attorney for the Town of Orange and member-at-large of bar council.

Endnotes

- 1 For more information about People to People, see their Web site: [www.ambassadors.com](http://www.ambassadors.com).
- 2 Sepedi, Sesotho, Setswana, siSwati, Tschivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.
- 3 Transfer of title is accomplished by an order of the Court commanding the Government to condemn the land, pay its owner just compensation, and transfer title to the claimant.
- 4 Approximately, 44,000 acres.
- 5 For further information, see the court's Web site: [www.law.wits.ac.za/lcc](http://www.law.wits.ac.za/lcc).
- 6 The history of this Commission is well set out in Bishop Tutu's recent book, *No Future Without Forgiveness*.



**Above:** The cheetah, which can run up to 100 mph, is Africa's most endangered species. Like our wolves, its enemy is the rancher. There is an effort to save the cheetah by educating farmers to use Russian dogs (bred to fight bears) to guard their sheep instead of eradicating the cheetah. This captive animal has its own racecourse, and I can testify that it purrs very loudly.



**Right:** This Robben Island tour guide, like every guide employed there, is a former political prisoner. Robben Island was formerly a lepers' colony and later confined black political prisoners including Nelson Mandela (where he wrote *Long Journey to Freedom*). It is now a national historic site.