PUBLIC LECTURE

Liberty, Equality, Fraternity: Bringing Human Solidarity Back Into the Rights Equation

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Lecture by former Justice Albie Sachs, delivered at the Centre for Applied Human Rights, University of York, 6 October 2011.

I wondered why I was so keen to attend a conference in faraway Montreal to honour Charles D. Gonthier, who had died two years previously and was as different to me as anyone could possibly be. I had met him only once or twice, he was a non-demonstrative person, and the sole thing we seemed to have in common was that I was a judge on the Constitutional Court in South Africa and he was a judge on the Supreme Court in Canada. He came from a distinctively Catholic, French-speaking Quebec community, and was very family orientated. His whole world view – and life experience – had been totally different to mine. I was a grandchild of Jewish immigrants in South Africa. My parents had fought their parents over religion and I had grown up, literally at the other end of the world, with a determinedly secular and internationalist outlook.

Why, I wondered, was I willing to undertake a long, tiring and expensive journey to a conference about the life and thought of someone whom I had barely known, and whose experiences and philosophical values had been totally different from mine? Sometimes your intuitions speed far ahead of your brain and your body, and only when I actually arrived at McGill University did I realize that what had drawn me so powerfully to honour him had precisely been the fact that we had been so far apart. The result was that in an unusually pure way we had been united solely through sharing a similar constitutional vision.

Charles was a strong exponent of the French notion of fraternity – liberty, equality, fraternity – and I had become deeply imbued with an equivalent ethos in South Africa called Ubuntu, about which I will say more later. And we were reaching common conclusions about the nature of the judicial function and about how human rights should be understood. My intuition sensed, and my brain ultimately accepted, that through honouring distant Charles, I would indirectly be paying tribute to my immediate colleagues whose virtues I had simply taken for granted as I had sat next to them in Court, and who would have been deeply embarrassed had I chosen publicly and to their faces to extol their virtues. We were eleven judges with very different life experiences, some religious, some non-religious, and of those who were religious, men and women of different faiths. Yet we could articulate and agree upon a strongly-held vision in relation to what was meant by

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fundamental rights because we all acknowledged the need to look at our work through the prism of our Constitution. It was Charles Gonthier's emphasis on fraternity – in a famous paper he wrote that's now achieving considerable prominence in Canada (Gonthier, 2000) – that triggered the theme that I'm going to speak about tonight, of how judges in continents far apart and possessing profoundly different world views, can develop shared constitutional approaches. In this case, the catalyst was the need to reintegrate the element of human solidarity into our understanding of the core notions of liberty and equality.

To go back a bit in human history – autonomy, human autonomy, is one of the great achievements of humankind. Emerging in different continents at different times, the notion in Europe came to the fore in the 18th century Enlightenment. The culmination of a long and hard-fought process, it established the notion that instead of human beings having their lives determined by their birth, their lineage, the family in which they grew up, the tribe they belonged to, or their ethnic group or faith community, each individual had a conscience, they had choice, they had personal autonomy. And I grew up with the understanding that this was an enormous breakthrough for humanity – that every individual counted as an individual, independently of birth, and station, and race, and position in family. And, as such, you had inalienable rights – including the broad right to pursue happiness. Undoubtedly, the very notion of basic human rights is heavily dependent upon that achievement. It was a socio-cultural – or if you like, a socio-psychological – accomplishment, which gave rise to the idea of fundamental rights that inhered in everyone simply because you were a person. And I'm emphasizing the significance and importance of this – which is well-known and taken for granted – to bring out the price that we have paid for this extraordinary achievement. And the price has been the loss of the sense of organic relationship with other human beings, of community, and of human interdependence.

Previously, interdependence had been fixed. It was established by your birth – you fitted in to an allotted destiny. If you were fortunate you might have been a king. But there weren't many kings, and even fewer reigning queens, though there were more in the sequence of the entitled: in Europe variously called princes, dukes, barons, knights and squires, in Africa and Asia given an equal number of honoured denominations.

The great majority, however, were just serfs (servants) – people tied to pieces of land somewhere, owing fealty to more privileged families. The term was European, but this wasn't by any means an exclusively European phenomenon – you found it in Africa in our traditional societies. People would be born into communities with established hierarchies and forms of responsibility, with predetermined connections, duties and loyalties – sometimes referred to as feudal. And you found it in Asia, you found it in Latin America – it was fairly universal. Its strength came from the existence of community, connection with others, a form of human interdependence. It

was a solidarity based on hierarchy, on dominant groups enjoying extraordinary material and psychological benefits, with subordinate groups doing most of the work – producing most of the food, doing most of the fighting, tilling most of the land, building most of the buildings – to enable these dominant groups to survive and prosper. Yet the sense of organic connection and relationship extended powerfully downward, all the way towards the most subaltern and exploited sectors of society. Then, first with mercantile capitalism, later with the Industrial Revolution, came the extreme atomizing of our world and society. Associated in economic terms with the market, private property and globalization, coupled with a huge expansion of productivity and creativity in all sorts of ways, as well as great daring in thought, and profound challenges to existing ways of seeing the world and imagining things. And the cost of liberation was disintegration and alienation; the price of the ending of bondage was the ending of bonding.

The French revolutionaries sought to prevent any schism between freedom and community. Their famous cry was Liberty, Equality, Fraternity. And Charles Gonthier, like the crowd in the street two hundred years before, believed with all his heart and imagination that fraternity represented the sense of human interdependence that is part of the equation of liberty and equality. Conversely, he was equally convinced that the detachment of fraternity from the triad of human aspiration had brought about the impoverishment of both liberty and equality. In his eyes, fraternity was far from being the enemy either of liberty or of equality. The human solidarity he envisaged was quite the opposite of a terrifying and frenzied collective existence based on subordination to some notion of the popular will. Rather, he saw it as being based on a deep and gentle sense, both spiritual and practical, of human interrelationship that enriched liberty and equality. This was not merely a private stance he adopted. It affected his constitutional gaze as he sat as a judge reflecting on how the Charter of Rights was to be interpreted and applied in Canada.

I was very struck by the extent to which those of us in South Africa, picking up on the rich philosophical traditions in African society embodied in the word Ubuntu (which, I promise, I will discuss later), were searching for a very similar mode of – not suppressing liberty, not reducing equality to some kind of bland and textureless standardization – but of reinvigorating both those concepts by locating them in the context of human solidarity. I also noticed that the discovery of the congruence of our thinking in different continents fitted in with a notion that I had found quite important for myself, that I'd like to share with you, the difference between globalization and universalism.

Globalization presupposes that you start with a set of significant ideas, instruments or technologies in one part of the world that you then extend throughout the whole globe, encompassing all of humanity, whether on sea or land or in the sky. Universalism proceeds in exactly the opposite direction. Things happen all over the world – and in terms of notions of human rights, people articulate claims and demands about the circumstances in which they

want to live – in every continent. You then distil out of these multitudinous claims points of commonality found all over the globe which are then referred to as universal notions. Historically, globalization preceded universalism, often in the brutal forms of slavery and colonial domination. But ultimately they came together in the Universal Declaration of Human Rights in 1948. Primarily I see the Universal Declaration as being a representation of universalism, to the extent that the Second World War had embraced all of Europe terribly and dramatically, much of Asia terribly and catastrophically, as well as large proportions of Africa in disastrous fashion, while North and South America had been involved through sending troops to the carnage. It was truly a World War that impacted on all of humanity, with global participation in the fight against notions of superiority of one race, or certain races, over others; and there was a near universal repudiation of the claims of certain nations that in the course of warfare they were entitled to do as they wished – to dominate, to ravish, to colonize, to control, even to exterminate peoples. Huge swathes of humanity were involved in the resistance to Nazism and fascism in Europe, as well as to imperialism from Japan. And so there was a geographically and socially widely dispersed urge to get together to produce a globally-agreed affirmation of the new values that had eventually won out. From this crucible of human tragedy, there emerged a determination to ensure that never again would human beings be subjected to such atrocious travail. And so, three years after the war's end, the Universal Declaration of Human Rights came into being. One reason why the Universal Declaration has stood up so well over the decades is that it had that input, a universal embrace that anticipated and helped bring about decolonization and promoted at least the formal equality of all nations.

It wasn't, then, simply a case of a few lawyers and political scientists and statesmen (and a couple of stateswomen) in the West coming up with a bright idea, and then trying to impose it as a force of globalization on the whole of the rest of the world. On the contrary, in the words of the Preamble to the Declaration, it expressed a pan-continental longing for a world in which all members of the human family would receive recognition of their inherent dignity and equal and inalienable rights, as the foundation of freedom, justice and peace in the world. In that respect the process was far more one of universalism than of globalization.

To say that the Declaration is universal in its ambition is not, of course, to ensure that it will be universally understood in terms of its ambit. Thus, the West is often accused of seeking to impose a globalized interpretation of human rights and democracy that manifests the imprint of deeply embedded elements in North American and European political culture, assumed to be universal. Critics contend that these are applied in an automatic, politically decontextualized and culturally insensitive way. One example is after the overthrow of a dictatorship, the transition to and installation of democracy is reduced simply to the single event of holding of an election to choose a

president or government. Of course, elections are exceptionally important to establish legitimacy and accountability of any government. Yet, for a more profound entrenchment of fundamental ideas of democracy and human rights a degree of continuity, openness and popular participation in an ongoing way is required. And, sadly, the point is made that when the electoral process results in the victory of a party or personality not favoured by the West, all too often people in the West find it convenient simply to ignore the outcome of the elections.

Other critics, however, point to a strong tendency that authoritarian rulers in Africa, Asia, Latin America and the Arab world have had to seek to evade the principles of the Universal Declaration. Their argument has been that the Declaration ignores local systems of authority of ancient origin, disrespects indigenous religious values and generally imports alien and unrealistic notions into their countries. In practice, however, there is strong evidence that this denial of universality has been used by tyrannical regimes to perpetuate their own power and justify indigenous oppression of their own people. The pain of torture, of arbitrary detention and of being silenced has been no different in Rangoon, Cairo, Libreville or Buenos Aires than it has been in Lisbon or Athens, or, for that matter, Guantánamo Bay. Indeed, a notable feature of developments in the recent period has been the extent to which authoritarian rule, in many parts of the world, defended on the basis of local exceptionalism, has given way to universal notions of openness, democracy and the rule of law, almost invariably as a result of popular local struggle.

With these introductory observations in mind, I turn to the way in which I see liberty, equality and fraternity interconnecting as values of universal application.

Liberty

It is difficult to convey to this audience the intensity of a debate which ten to fifteen years ago was tearing American law schools apart, namely, that between libertarianism and communitarianism. The clash is less violent today, but still has its reverberations for human rights. The libertarian approach is deeply entrenched in the notion of autonomy, of the uniqueness of each individual. It's a powerful concept and its critique of the potentially oppressive impact of communitarianism is attractive. The communitarian notion, on the other hand, is also attractive. It is based on acceptance of the idea that we don't live as isolated, atomized individuals, we live in families, neighbourhoods, communities of every kind – sporting, faith, political. To nurture our autonomy we need education, which in its essence is connective; to survive at all, the individual needs health which by its nature depends on the food we eat, the water we drink, the shelter we enjoy and the caring we can have when we are ill. So the communitarians offer a persuasive critique of the cold, harsh and inhuman possibilities flowing from libertarianism. The end result is that I find myself agreeing with the essential claims of each approach, as well as with the critique that each has of the other! I share the

libertarians' fear of developing a statist or collectivist society that suppresses choice, decision-making, the uniqueness of individuals, and that submerges our individuality and diversity by converting us all into mere members of groups or communities. But I also join with the communitarians in saying that we are not isolated beings, we are not Robinson Crusoes on desert islands, and in fact it's living in communities that nurtures, strengthens, and gives vitality to the individual potential of each one of us. My preferred option, then, is to seek to combine the strengths of libertarianism and communitarianism, and this I do by supporting the principles of dignitarianism.

It's human dignity that connects the vitality and spark of libertarianism to the texture and richness of communitarianism. It's part of your dignity that you can make choices, determine your life path, be curious, create and invent – that's part of your place in the world as a unique person. But respect for human dignity also acknowledges that to do all these things in a meaningful way you are connected, involved and interactive with your fellow human beings. So human dignity becomes the key, the central, overarching or dominant notion, that ties together these two important and apparently contradictory notions – autonomy and community – producing an indivisible whole that corresponds to and enhances real lives lived by real people.

The implication, then is to bring fraternity and Ubuntu back into the constitutional equation with liberty (my final promise on Ubuntu is that it will be explained in the last portion of my presentation). Extreme libertarianism, supporting an absolute exercise of autonomy detached from any social context, can be destructive rather than constitutive of freedom. This becomes evident in the area of speech, as illustrated in a recent decision by the United States Supreme Court in a matter concerning legislative regulation of the financing of political campaigns.[1] Senator McCain, a Republican, and Senator Feingold, a Democrat, had got together to try and reduce the impact of money on elections. The law that was duly adopted by Congress was challenged by libertarians as a violation of the right to free speech guaranteed by the First Amendment, coupled with the associated right to spend your money as you liked. The avowed objective of the law was to promote democracy. Yet, by a narrow majority, the Supreme Court struck it down. Basically expressed, the majority held that Congress had no power to restrict First Amendment rights to spend your money as you liked in support the candidate of your choice. The minority view, strongly articulated by Justice Breyer, was (I'm paraphrasing) – it was the undue influence of money that was in fact undermining free speech, allowing the speech of the rich and the wealthy to overwhelm and drown out the voices of those who didn't have as much money. The result was that the legislative adoption of an active notion of liberty, based on an understanding of freedom in the actual context in which people exercised their choices, expressing a

1 *Citizens United v. Federal Election Commission*, 558 US 50 (2010).

bipartisan view with huge popular support, was, on purely libertarian grounds, struck down as unconstitutional.

Another example of the need to contextualize the exercise of speech in ways which ultimately allow for greater speech by more individuals arises in the case of controlling hate speech. International law actually requires the state to take action to prohibit – or to limit – speech which intensely and aggressively attacks people for being who they are, which denigrates their potential, their capacities, simply on the grounds of gender, race, or religion.[2] In the United States unless the hate speech reaches the stage of inciting immediate violence or constitutes threats to the lives of others, any prohibition on it will be struck down. There was a famous case involving a constitutional

2 Article 4 of the International Convention on the Elimination of all Forms of Racial Discrimination (CERD), 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969), provides:

> States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:
> (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
> (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
> (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Article 20(2) of the International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), also places an obligation on states parties to prohibit hate speech, providing that:

> Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 2(e) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981), provides:

> States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:. . .
> To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.

challenge to a Chicago City Council regulation prohibiting Nazis from marching outside homes in a Chicago suburb where many Holocaust survivors were known to be living.[3] The Nazis had provocatively targeted this area with a view to taunting the survivors with their avowed anti-Semitism. The courts upheld their constitutional challenge on libertarian grounds, deciding that the regulation denied free speech and had to be struck down. In Germany, on the other hand, where free speech is also constitutionally protected, Holocaust denial is a criminal offence. It can land its author in jail because it's touching on something so deep in the history of Germany, so associated with a catastrophic decade and more in the country's life, that it went far beyond simply having the right to say what you wanted, and subjecting your ridiculous ideas to the test of being refuted by better argument. It touched on themes central to the nature of the country's new democracy; it kept atrocious memory of unspeakable indignity and extermination alive; it imposed unacceptable levels of continuing hurt on survivors of the death camps; and it threatened to provide justification in advance of new forms of extreme intolerance for future vulnerable groups.

So much depends on context. In many countries, in restricting expression that is deeply demeaning and hurtful, the law seeks to foster certain basic elements of human empathy and a vision of an inclusive and pluralistic democracy. In others, the limitation on expression is justified by an acknowledgement of the potential that fighting words have to rupture the very foundations of common citizenship and lead to deadly conflagration. Even if it doesn't incite immediate violence, divisive and hateful speech may tear the fabric of the society apart, dislocate communities and engender the kinds of enmity which at a later stage can lead to xenophobia and genocide. Tragically, these are not just speculative or hypothetical scenarios.

I once shared a platform at a Book Fair in Sweden with the Nobel Prize winning Nigerian writer, Wole Soyinka, and Nadine Strossen, a distinguished leader of the American Civil Liberties Union, an extremely articulate and persuasive defender of free speech. Nadine spoke forcefully and fluently in favour of virtually unlimited free speech. Wole then started his response in a way that I found surprising and disconcerting. 'We have just been listening to a white middle-class woman from America', he told us in his deep voice, 'giving us a typical lecture of the kind we can expect from a white middle-class American woman.' Nadine went pale. The audience was embarrassed. I felt a degree of shame that a great writer from my continent could dismiss her arguments in that shallow way. Wole paused for a moment, relaxed his stern posture, and added more quietly: 'You see, Nadine? These were just words. And they hurt, didn't they?' He then went on to tell us about somebody going around parts of northern Nigeria denouncing Christians, to which many people responded by saying, 'well, it's stupid stuff, but that's

3 *National Socialist Party v. Skokie*, 432 US 43 (1977).

free speech'. A year later a hundred Christians were massacred. The words had acted as recipes for murder. In Rwanda it started off with a broadcaster speaking about cockroaches. The word kill wasn't used, but a million people died. So speech then readily transforms itself into a warrant of execution. When words are realistically capable of becoming instruments of division and death, you shouldn't have to hold back in taking action against them until the moment of actual homicide. Pre-emptive action is far more called for than posthumous lamentations and even more belated prosecution.

Normally I'm a great defender of free speech against any form of control. Normally I would argue for defeating ugly speech with better argument, and contend that the law shouldn't step in and deal with every piece of obnoxious rubbish spoken over a drink in a bar – you've got to respond to it on the spot as well as you can. Normally I am concerned about censorship and thought control, about the importance in an open society of not suppressing alternative and unpopular views. Normally I side with people who demand that those who exercise power should take in their stride the slingshots and arrows of outrageous criticism, however unwholesome or unfair. But at the same time I believe that the right to say what I like, when I like, to whom I like, has to acknowledge the demeaning and destructive impact that words may have in a particular context. Attacks based on race dig deep into the souls of human beings, denying them moral citizenship in their societies and touching on memories of their families' slavery, and various other forms of abusive domination. In similar vein, it's sad today to read of examples of homophobic attacks that had started off with hate-filled speech and ended up with people being beaten to death. In sum, the libertarian right to speak your mind has to be balanced against profound constitutional values of shared citizenship.

One of the most time-honoured bulwarks of liberty is not to be imprisoned or otherwise penalized by the state without a fair trial. And one of the principal elements of a fair trial is the right to test accusations made against you by means of cross-examining prosecution witnesses. It is easy to understand, then, how shocked civil libertarians in Canada were when, as a result of prolonged campaigning by the women's movement, the law dealing with the manner in which rape trials were conducted was changed to limit the extent to which defence counsel could cross-examine the complainant in relation to her previous sexual history. The rationales for this limitation were twofold. In the first place, it was to avoid jury members from being unduly prejudiced against complainants through a tendency to rely on stereotyped views rather than all the actual evidence. Thus counsel could suggest or imply that because a woman has 'slept around' she was an 'easy lay' who had probably consented to intercourse in the case in question. Secondly, the administration of justice was being compromised by the unwillingness of complainants to come forward knowing that their life would be examined in great detail in a public way on private issues bearing little direct relevance to the question whether the man had subjected her to non-consensual sexual intercourse on

the occasion charged. And so the Canadian Parliament introduced a law that provided restrictions on the introduction of extraneous issues which could be highly prejudicial through stereotyping, and have only minimal relevance to the actual events.[4]

The new law locked the Trial Lawyers Association, on the one hand, and the women's movement, on the other in bitter conflict. A great lawyer and good friend of mine, now on the Supreme Court in Canada, Rosalie Abella, would give lectures on how this new law reflected the tension between civil rights and human rights. When I first read one of these lectures I was stunned. Surely, I thought, human rights and civil rights belong to the same family, they go in the same direction. Rosalie pointed out that civil rights would emphasize the right of the accused to a fair trial, his right to cross-examine the complainant about anything that might turn out to have some bearing on her credibility. Against that, however, the human rights approach highlighted the way in which the complainant could well have suffered a grievous violation in relation to the most private aspect of herself; that sexual assaults were part and parcel of systems of male domination that have thrived in a culture that expressed itself in an assumed 'right' to bear down on women and to infer consent when it wasn't consent, even to say 'that's how women like it'. And so the clash of perspectives could best be resolved by balancing out fair trial rights for the accused, against the right to dignity of persons who might have suffered gross violations of body and spirit. How to balance out the competing interests? The law was carefully crafted so as not unduly to limit the rights of cross-examination, and passed constitutional scrutiny by the Supreme Court. Not only the rights of the particular complainants, but the rights of women in general, were at stake. The presumption of innocence remained intact, but cross-examination was restricted to matters sufficiently proximate to the issues involved to make it fair both to the accused and the complainant to allow it to proceed.

Another example of a clash between individual civil rights and a broad conception of human rights, relates to the environment. Justice Antonin Scalia of the United States Supreme Court declares firmly, certainly in his extrajudicial opinions, that all this talk about climate change is something of a hoax. He says so publicly – and he's my friend, I'm not being disrespectful to him – and he does so from a libertarian point of view.

Underlying his opposition to the huge movement concerned about reversing climate change is a near absolutist notion of the freedom of the individual. The argument is that nature has its own way of working, and people should be allowed to go ahead and do what they want without yet further restraints on free enterprise, particularly when imposed by state regulation based on dubious scientific evidence, and made even worse when cross-border controls are enforced, permitting people's rights to be determined by

4 Section 276, Criminal Code, RSC 1985, c. C–46.

other countries. I would say the whole of environmental law represents a post-technological revolution in response to the enormous energy and creativity that came with individualism, autonomy, private property and scientific advance and development. It represents a shocked reaction by our present generation. Millions throughout the globe seek to reinstall a sense of humanity, and to advance the nation of the earth, if you like, having claims to be the earth, of the species to be the species, of the flora and the fauna to be flora and fauna, ideas which we as human beings have to acknowledge and protect through a system of enforceable rights and remedies. It's saying that the exercise of rights is not just dependent on individual will and personal self-determination, and it's not just those of us who are alive today who are involved – we have to look to the rights of future generations. The notions of fiduciary responsibility, the rights of people yet to be born, the precautionary principle and the idea of trans-frontier rights all stem from an emerging legal philosophy concerned with the environment and sustainable development. And it's producing an enormous revolution, a transformation in the nature of legal thinking, which might, in fact, be exactly what most alarms Justice Scalia. It is challenging the idea of rights as being based crucially and essentially on protection of the will and ambition of an individual.

Initially, the archetype of a holder of rights was the land-holding patriarch, who dominated his family (and slaves or servants). Rights radiated around the notion of the private property-owner who had occupied and laboured on a fenced-in space into which the state dared not intrude. Certainly, the idea of protected space around the individual is important – it needs to be recognized, the state can't do whatever it wants, and there are inviolable areas relating to each one of us, each human being, each person, that need to be recognized. But not in an unduly expanded manner that obliterates the fact that in reality we live in communities. We are part of humanity. Experience teaches us that the notion of liberty is enriched when you introduce the notion of fraternity. Our interdependence gives texture and substance to our liberty. It rescues us from loneliness and narcissism, from greed and insensitivity, and enhances our dignity as members of the human race.

Equality

What about equality? The biggest debates that I've encountered in terms of how we look at equality relate first to the issue of formal equality versus substantive equality, and secondly, to how to deal with the right to be equal but at the same time be different.

The formal approach to equality simply says you treat everybody in the same situation in the same way – identical treatment. And you don't allow issues of race or gender, for example, to qualify in any way the treatment. Its supporters say that they are colour-blind and gender-blind. This was the approach adopted by the majority in the United States Supreme Court when, negating a decision of a primary school in Seattle to go for as much diversity

as possible by facilitating entry into the school of children from minority groups. Most of the parents were happy with the school programme, but a few from the white community objected and said: 'my children are being kept out of that school simply because they are white'. The minority in the Supreme Court argued forcefully, but unsuccessfully, that diversity had an important educational value in itself, even if you left out the justice aspect of redressing systematic past discrimination. Writing for the majority, however, Chief Justice Roberts said that if you want to end race discrimination, you must stop discriminating on the grounds of race. The result was that in the name of equal protection, the Court invalidated an effort by the School Board, supported by the majority of parents of all backgrounds, to take a modest step to promote substantive rather than purely formal equality.[5]

The substantive equality approach starts by looking at the way people have actually been living and the manner in which belonging to a particular group has in social and legal practice been used to prevent members from enjoying the benefits of life in a full way. Substantive equality permits forms of redress and remedial action to overcome these structured, systemic forms of subordination. And so, to achieve substantive equality, forms of affirmative action are authorized, maybe even required. The Richmond City Council had set aside a modest quota of municipal contracts for minority contractors because historically they'd been kept out – to give them the experience and opportunity to grow and develop. But the United States Supreme Court, by majority,[6] struck that affirmative action programme down as being based on race discrimination. The first African-American on the Court, Thurgood Marshall, spoke movingly on how admirable it was that the largely white council of Richmond, the capital of the Southern Confederacy, was now taking measures to bring about greater opportunities for people who remained trapped on the periphery of economic activity as a result of generations of discrimination. Yet, he pointed out, here was the Court of which he was a member, striking down a measure designed to achieve equality and doing so in the name of equal protection.

At about the same time, legal thinking of the Canadian Supreme Court was moving in the opposite direction, from a preoccupation with formal equality towards one more based on achieving substantive equality. It could be that the women's movement had much to do with this changing emphasis, whether in relation to gender, or race or disability. As the distinguished American legal philosopher, Ronald Dworkin, has put it: equality doesn't mean giving the same treatment to everybody, but, rather, showing equal concern and respect to everybody. And giving equal concern and respect takes account of the factors in people's lives which prevent them, because

5 *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 US 701 (2007).

6 *City of Richmond v. J. A. Croson Co.*, 488 US 469 (1989).

they are who they are, from enjoying real equality. So a substantive approach to equality ends up supporting forms of redress or remedial action that look at the actual lives that people lead, and takes account of historically constructed patterns of disadvantage connected with attributes such as colour, ethnicity, gender, religion, disability, sexual orientation or birth. And of course in South Africa our Constitution permits, and our Court supports, remedial action and redress of structured, systemic forms of discrimination. Given the immense and pervasive inequalities created by apartheid, any other approach would have been out of the question. What remained was to ensure that the modes of redress met up with the constitutional criteria of fairness and proportionality. The Constitution thus facilitates redistribution through using the assets the state has (or acquires equitably), and through the benefits it can provide, and the action it can undertake to enable people in reality to lead more fulfilled and equal lives. At the same time, it forbids arbitrary seizure of assets for distribution to family or friends or political supporters of those in power.

What about equality and difference? This was the dominant issue in the same-sex marriages case heard by our Court in South Africa.[7] Two people met, were attracted to each other, dated, went out together, decided to set up a joint home and live together, which they did for about ten years, with everybody regarding them as a couple. Eventually they felt they should get married. But when they went to the marriage office, the registrar said he personally had no problems, but since they were both women they could not pronounce the statutory marriage vow: I AB, take you CD, to be my lawful husband/wife. This, he said, connoted the marriage of a man and a woman.

They challenged the law on the basis that it discriminated unfairly against them on the grounds of sexual orientation. Forceful counter-arguments were advanced on behalf of faith communities, saying in effect: 'we're not against gay men and lesbian women living together and getting protection from the law. But, please, please, don't call it marriage; marriage is something that was created in our religious communities; it has a sacramental character, the state learnt about marriage from us, please leave intact an institution directed towards procreation, and intrinsically heterosexual.' They contended further that recognition of same-sex marriages would undermine traditional religious notions of marriage, and infringe religious freedom. Yet that last argument became the very reason why the right to equality was engaged. Why should a marriage between her and her undermine respect for a marriage between her and him? Surely it would be extending rather than subverting the notion of marriage if it was expanded to enable her and her to express their love and affection for each other in a public way, and get the status, accept the responsibilities, and enjoy the benefits of their relationship in the

7 *Minister of Home Affairs and Another v. Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005).

same way that she and he could do. And central to the judgement is the notion of equality acknowledging equal rights embracing rather than suppressing difference. It would have been absurd to say that there was nothing to stop a gay man from marrying, as long as he married a woman, or to stop a lesbian woman from marrying, as long as she married a man!

You shouldn't have to suppress who you are to enjoy equal rights. So, the right to be the same, in terms of access to marriage, became meaningful to lesbian and gay people only if coupled with a right to be different in respect of sexual orientation.

This approach is particularly relevant to the acquisition of citizenship. Thus, it is good that you can become a citizen of a country no matter what your background, where you come from, or what you look like, provided you meet the qualifications of birth, marriage or residence. But that does not mean that to become a citizen you have to forego your culture, your religion, your different ways of seeing and doing things. On the contrary, you strengthen the significance of citizenship through adding diversity to the character of the nation you enter. That doesn't deny that there are a number of core and intensely meaningful features that go with nationhood in that particular country, and that bind the citizens together. Respect for the law and for the rule of law would be primary amongst them.

As I see it, Britishness is not diminished by virtue of the fact that British society is constituted by people of diverse origins and with different cuisines, and faiths, and outlooks, and ways of doing things. On the contrary, I would say it strengthens, it enriches the core qualities of openness and tolerance of which many British people are proud. Indeed, if you look back at the history of Britain – so many people came in and invaded and brought in so many different things over centuries. What we're seeing now is just a continuation of that process, but this time without conquest, because one doesn't want any more conquests, in any country, anywhere.

Fraternity

Fraternity – Ubuntu – human solidarity. Ubuntu is a long-lasting philosophical notion in southern Africa based on the conception that I am a person because you are a person; that I can't separate my humanity from an acknowledgement of your humanity. It presupposes that I don't strengthen my personality through isolating myself from you; but on the contrary, I benefit from my association with you.

We got our Constitution in South Africa because of Ubuntu. Millions of ordinary people, particularly poor people, in spite of all the insults, humiliations, the injustices, and violence wreaked upon them, never lost their sense of Ubuntu, and never gave up on the notion that even the oppressors, people who were behaving so abominably, could now be embraced and become part of that wider community of free and equal South Africans. Ubuntu, at the very least, requires listening, dialogue, speaking – it gives a voice to

everybody; everybody matters. And I'm going to conclude with three cases that came to our Court where the theme of Ubuntu played a central role in determining the outcome. And what unites the three cases is that by underlining the importance of human interdependence as opposed to individual isolation, they opened the way to developing creative and healing forms of restorative justice, as opposed to reliance on purely declaratory, or punitive, or compensatory justice.

The first was the *Port Elizabeth Municipality* case.[8] This case shook my judicial confidence quite profoundly, leading me to have serious thoughts about leaving the Bench. Fifteen African families who had been evicted from their previous homes had put up their shacks on some undeveloped land owned by white people close to a very upmarket suburb in Port Elizabeth, South Africa. And the owners asked the city council to move the court to get an eviction order. When the matter eventually reached our Court, I felt a dismaying and irreconcilable tension between Albie the judge, and Albie the person. Albie the judge accepted that you can't just go and set up your shacks on somebody else's land. I'd taken an oath to do justice without fear, favour or prejudice to all. And in terms of the law and the Constitution, and on the face of the evidence, the inescapable conclusion seemed to be that the African families had to move. But to Albie the former freedom fighter, the history of huge dispossession over centuries of African people from their land, the migrant labour system, the fact that they had been excluded by law from owning homes in the cities and forced to live in 'locations' on the outskirts, meant that I couldn't in good conscience be a party to an order evicting these homeless families. Albie the judge versus Albie the anti-apartheid activist – what to do? Fortunately for my judicial career, I was able to convert a personal crisis into an intellectual dilemma.

[Let me say in parentheses that these are the best intellectual dilemmas you can have! If any of you are ever thinking of writing a thesis, or maybe even a novel, or putting on a play, the best subject matter is the one where you are pulled in different directions by apparently irreconcilable forces that inhere in the situation and you don't know the answer. My advice to you is: embrace and immerse yourself in the impossible, glory in the intractable, it's the richest material you will ever have!]

The Constitution said no one could be evicted from their home except by an order of a court that took account of all relevant circumstances. Not very helpful – 'all relevant circumstances'! Then an implementing law was passed which said the courts must do what is 'just and equitable' – also not very helpful! It's just and equitable to tell people to get off land where they've just arrived unannounced, and plonked their shanties. At the same time it's just and equitable that human beings who are homeless and landless not because

8 *Port Elizabeth Municipality v. Various Occupiers* (CCT 53/03) [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) (1 October 2004).

of any fault of their own, should not be evicted from their homes. So the way the intractable problem was resolved was by holding that justice and equity required more of a court than simply to issue a declaration that determined whose legal rights should triumph. We held that it could never be just and equitable to evict people in these circumstances if mediation hadn't first been tried in an attempt to find a way that would be fair across the board. The judicial function changed from determining who was legally in the right – they both were! Instead it was to manage and direct a socially stressful process with the aim of achieving fairness through requiring the parties themselves to engage in dialogue.

And in a later case, my colleague Zak Yacoob picked up on some words that I had used in passing – 'meaningful engagement' – to develop a whole new aspect of our jurisprudence on evictions.[9] Cases frequently are brought to the courts in South Africa by desperately poor people crowded into inner-city buildings, where the lights have been cut off, the water's not there any more, they've got nowhere else to go, and the buildings are needed for re-development. Instead of simply saying to the occupants 'you've got to get out' or 'you can stay', the courts now require 'meaningful engagement'. This compels the local authorities to meet with the occupants and the developers, laying down broad criteria with regard to provision of alternative accommodation. The court supervision also presupposes individualized treatment of occupants, rather than just looking at them as a mass of poor people to be handled in a homogeneous way to make way for development. You've got to see each family, each person as an individual, entitled to have his or her circumstances evaluated. And in coming to the conclusion that we needed to develop a procedural approach, managed by the Court, rather than seek a simple determination of whose legal rights had to triumph, I found I had to refer to Ubuntu. Ubuntu took account of the fact that the interested parties were simultaneously geographical neighbours and social strangers. Ubuntu went beyond the concern for fellow human beings on hard times that any decent person should have. It presupposed that not only the dignity of the desperately poor was at state. In addition, the dignity of all South Africans was assailed by the fact that millions of our fellow human beings were compelled to live as homeless wanderers in the country of their birth. In declaring that the Bill of Rights was nothing if not Ubuntu writ large, the judgement emphasized that in dealing with matters such as these, the old individualistic and highly technical notions of private land law had to be developed to embrace new concepts of land rights that would balance out competing interests in a principled and fair manner, so as to produce as much justice and equity as possible.

9 *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v. City of Johannesburg and Others* (24/07) [2008] ZACC 1; 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC) (19 February 2008).

The next case involving Ubuntu was one dealing with damages for libel.[10] A manager in a local authority had been criticized by an official for overuse of a cell phone (mobile). The manager said some very rude things about a subordinate official who had had the effrontery to openly criticize him. The press picked up on his denunciation, and the aggrieved official sued the manager for quite heavy damages in the High Court, and won. The evidence showed that the manager had been wrong to impute impropriety to the official, who received substantial damages. I felt the damages were too high. But that wasn't my main concern. I felt there was something basically wrong in the first place about the emphasis in our law of defamation on awarding money damages for loss of reputation. You don't quote someone's reputation on the stock exchange (unless, that is, you're a trader and your trading reputation is part of your goodwill). I felt the law of libel should be developed to put much more emphasis on getting an apology and reconnecting the parties, and that an apology freely offered and generously accepted could do far more to restore the reputation of the harmed person – so he or she can walk out of the court with head high – and to restore social harmony than getting a money award. The placing of a monetary value on a reputation, to my mind, is actually a denial of the intrinsic quality of what your dignity as a human being is really worth. Ubuntu and the African mode of settling disputes by bringing the parties together and acknowledging that you're all going to live together in the same community afterwards can do more to restore dignity and heal the social rupture than a monetary penalty calculated to ensure continuing antagonism. And I am pleased to report that what my colleague Justice Yvonne Mokgoro and I offered as a minority view in this case has since been accepted by the Court as a whole as a guide to how defamation (libel) cases should be handled in future. This would mean that the courts' procedures should be directed towards clarifying the truth and trying to try to get an apology where a person's reputation has been unfairly injured.

This restorative justice approach has enormous implications for the criminal law. It seeks to achieve face-to-face encounters between those who have been most affected, rather than sending someone to jail, cutting them off from society and putting a brand of 'thou art a criminal' on his or her forehead. The human repair, the possibilities of actually reducing social schism and restoring equilibrium in the society, are greater if these forms of restorative justice can be achieved. It is an approach used extensively throughout the world in the case of juvenile justice. But the idea is to extend it to many other areas of criminal and civil law, particularly in rural societies where people are living close to each other and where the sense of community is great. Of course it needs to be carefully introduced in appropriate cases, and

10 *Dikoko v. Mokhatla* (CCT62/05) [2006] ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) (3 August 2006).

managed with care. But its potential to humanize and give more agency to more people in the justice system, strengthening it and making it more effective, is unlimited.

I will conclude with a case in which restorative justice principles made it possible to secure children's rights in circumstances where a more traditional individualistic approach to punishment would have left them high and dry.[11] M had been responsible for fraudulently using her credit card to buy food and sporting gear for her three teenage sons and liquor for herself. The total amount had not been huge, it could have reached about two hundred pounds (three hundred dollars) in all. She'd been prosecuted – it was crazy, she knew she'd be found out sooner or later – and she was given a suspended sentence – first offence, three young boys to look after. She does it again. And more than that, when she's out on bail the second time, she does it a third time! Lots of small amounts of credit card deception, maybe twenty or thirty different counts on each occasion – total amounts not very big – mainly for groceries – near certainty of being caught. She's sent to jail by the magistrate for four years. She's desperate. She's living in what's called a very fragile area socially, and knows that if she's not around her boys are going to get involved in gangs, drugs, the lot, and there's nobody else who can really look after them. The attitude of the magistrate is, 'well, sorry, you shouldn't have committed those offences in the first place, you knew you had those boys, you knew the danger they were in, and you were given chance after chance to correct your ways, but still you went ahead with your fraud'. She takes the matter on appeal and manages to get one conviction knocked out, which enables the judges on appeal to reduce the sentence to two years' imprisonment, with the possibility of her becoming eligible for community service after having served four months. But four months, she felt, would be disastrous for her children to be without her. She appealed to the Constitutional Court.

When I first saw her application I couldn't think of a more hopeless case. You've got a suspended sentence hanging over you, you're out on bail on further charges and you do it again. But one of my colleagues said to me: 'but Albie, you're only thinking about her, what about the children?' Our Constitution, she asked, says that in every case involving children, the rights of the child should be paramount, so aren't the three boys entitled to some independent consideration? We look at the record, see that the magistrate never considered the children's position specifically, and call for social workers' reports. In the end, our Court agreed unanimously that in all cases where a convicted person facing imprisonment is the primary caregiver of minor children, the sentencing court must make an independent investigation of the impact of a prison sentence on the children concerned. In a borderline case, the children's interests could be enough to keep the primary caregiver,

11 *S v. M* (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC) (26 September 2007).

usually the mother, out of jail. But if it can't keep her out of jail, the court has to ensure that the children will be properly looked after. And so the judgement was able to emphasize that the child doesn't necessarily sink or swim with the errant parent; that the child should not be seen as a miniature adult but as somebody growing up with the rights not just to survive and not be beaten up, and not just to get food and education, but the rights to explore and to have adventure, and, finally, that the child has a right to have the best chance possible to become a future responsible adult member of society.

The question, then, was: could we substitute a community service order to keep M out of jail altogether? Time had passed, and in the several years since the offences had been committed, she had set up two successful businesses, and shown herself to be a model member on the school's parent–teachers association. The social workers' report said she was an excellent parent, and there was nobody else who could adequately look after the three boys. Our Court divided. Four of my colleagues felt M had irreversibly crossed the line after receiving so many chances, and just had to go to jail for at least four months. But seven of us opted for bringing the community into the picture through a community service order – she would repay the money so that the grocery shops and liquor stores and the others would have some sense of being involved in the process; she would receive psychological counselling because there was clearly compulsive behaviour involved; and she would do useful work in the community as indicated by social workers and probation officers. The majority view of the Court was that the community would understand this. They would rather have her doing something manifestly worthwhile, and continuing to look after her children, than have her simply sent to jail where she'd be mixed up with other crooks and criminals, with no income for that whole period, her family disrupted, and the craziness that had driven her to behave compulsively and self-destructively more likely to be intensified. Most important of all, the children would be well protected by having her present and seeing her recover her self-esteem and sense of responsibility.

Happily, the Court's decision was well received by children's rights advocates all over the world, as well as by supporters of restorative justice generally. It turned out to be a good case to be involved in near the end of my judicial career, and it's a nice matter on which to end tonight. Liberty, equality, fraternity – Justice Gonthier and I agree that the words are as relevant to epoch-making events in the streets of Paris as they are for ensuring that children in a poor neighbourhood of Cape Town can be with their mother. Thank you.

Reference

Gonthier, C. D. 2000. Liberty, Equality, Fraternity: The Forgotten Leg of the Trilogy, or Fraternity: The Unspoken Third Pillar of Democracy. *McGill Law Journal* 45(3): 567–89.