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### Constitutional Protection of Minorities: Perspectives from Three Legal Systems—A Speech by Dermot Gleeson, Benjamin Liu, and Albert Louis Sachs

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**SYMPOSIUM**

**MINORITY RIGHTS**

**CONSTITUTIONAL PROTECTION OF  
MINORITIES: PERSPECTIVES FROM  
THREE LEGAL SYSTEMS<sup>†</sup>**

I. INTRODUCTION

PRESIDENT O'MALLEY:<sup>\*</sup> This morning, thanks very largely to the Dean of the Law School, who will be speaking to you in a moment, we have a remarkable group of jurists: one from South Africa, one from Hong Kong, and the Attorney General of the Republic of Ireland. They are speaking to you on the various institutional questions and problems in the multi-ethnic, multi-racial and multi-religious compositions of their countries.

All of those countries, like the United States, have written constitutions. All three of them are also former, or soon to be

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<sup>†</sup> The following speeches were graciously given by the participants for Loyola Marymount University's 1997 Charter Day Program on Minorities and World Politics. They were transcribed verbatim and contain no supporting references. It should be noted that the conversational tone has been preserved.

<sup>\*</sup> Father Thomas P. O'Malley, S.J. is President of Loyola Marymount University, Los Angeles, California.

former, British colonies. Of course, Britain has no written constitution, so that is an interesting paradox.

I thank you all for being here. I welcome our very distinguished guests. I am happy to say that we have members of all three of their countries represented here in our student body. I would like now to present to you the Dean of Loyola Law School, Gerald McLaughlin.

DEAN GERALD MCLAUGHLIN:\*\* Thank you, Father. To introduce our program today, I wish to begin with an old rabbinical tale. A rabbi asked his students, "When does darkness turn to light?"

A student raises his hand and says, "Rabbi, darkness turns to light when you can look down a road and see that a cow is not a sheep or a goat."

The rabbi says, "No."

The second student raises his hand and says, "Rabbi, darkness turns to light when you can look out into the garden and see that a fig tree is not a pear or an apple tree."

The rabbi says, "No."

The third student asks finally, "Well, Rabbi, when does darkness turn to light?"

And the rabbi answers, "Darkness turns to light when you can see in the face of a stranger the face of your brother or the face of your sister."

In a sense I think all enlightened constitutional structures aim to make the sea of faces in our neighborhoods the faces of our brothers and sisters. No structure achieves this goal perfectly, but some may do it better than others.

Today we are here to learn. To hear how other constitutional structures grapple with preserving human and civil rights for minority groups. Our constitution attempts to address these issues. We wish today, however, to see how others do it, to see if we can learn from this process. I introduce to you, our moderator, Professor Karl Manheim of Loyola Law School, Los Angeles. Karl has worked hard here in California to encourage this state and all of us

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\*\* Gerald T. McLaughlin is Dean and Professor of Law at Loyola Law School, Los Angeles, California.

here to see in the faces of strangers and immigrants the faces of our brothers and the faces of our sisters. As a member of an ACLU panel of lawyers, Karl worked to prevent enforcement of Propositions 187 and 209. There is no better choice than Karl to be our program's moderator today.

PROFESSOR KARL MANHEIM:\*\*\* Thank you, Dean, for those kind words and also thank you President O'Malley for your introduction. Father O'Malley stole one of my best lines. From now on I'll be very careful with what I tell him at dinner the night before a symposium.

In 1989 when the Berlin Wall came down, Francis Fukuyama, a senior policy analyst at the U.S. Department of State, wrote in the magazine *National Interest* that Western ideals, Western liberalism, and most of all Western-style Capitalism had triumphed over fascism, communism and all other social systems. What we were witnessing, Fukuyama wrote, was not just the end of the Cold War, or the passing of a particular period of post-war history, but the end of history as such. That is the end point of mankind's ideological evolution and the triumph of Western forms of government.

Of course Fukuyama was not the first to proclaim the end of history. Karl Marx believed the contradictions of all previous societies would be resolved by the emergence of a Communist utopia. Marx in turn borrowed his concept from George Hegel who argued that history would culminate at a moment "in which a final, rational form of society and state became victorious." For Hegel, history "ended" with Napoleon's triumph over Prussian forces at Jena in 1806. That battle, to Hegel marked the vindication of libertarian and egalitarian ideals of the French Revolution. Never mind that Napoleon was eventually defeated and monarchy restored. History ended in 1806. And in 1917. And again in 1989.

The end of history will be a very sad time, Fukuyama wrote. The worldwide ideological struggle that called forth daring, courage, imagination, and idealism, will be replaced by economic calculation and the satisfaction of consumer demands. In the post-

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\*\*\* Karl Manheim is Professor of Law at Loyola Law School in Los Angeles, California.

historical period there will be neither art nor philosophy, just centuries of boredom.

So here we are in 1997, eight years into post-history. Has anything of note occurred during this unheroic era of non-history?

Well, nations and empires have collapsed, civil wars have erupted and endured, entire populations have become refugees, and many fighting faiths have been shattered by events we dare not call history.

In these eight years of non-history, however, we have also witnessed some of these civil wars and insurgencies end, peaceful transitions of power in unlikely places, even peace blossoms in biblical lands. The risk of nuclear winter has dissipated, if not disappeared entirely.

One other sequence of events deserves mention in this era of post history. It is the continued development and preservation of national charters, and their promise of protection for individual rights. Not long ago this country celebrated the bicentennial of its Bill of Rights—200 years of American constitutionalism—an ideal that spawned similar movements in diverse lands. Constitutions seem to be sprouting up everywhere. Recently, for instance, I received a call from a former student of mine who is a legal officer for the United Nations in Sarajevo. She wanted advice on a new constitution for Bosnia-Herzegovina.

The principal mission of constitutions is to reconcile state power with individual liberties, a not so easy task given the corrupting influence of power and the fragility of human rights. Despite the reverence they often receive, constitutions are often overrated as instruments of stability and guarantees of liberty. The Soviet Constitution, it may be remembered, was long on individual rights, but short on any effective restraint on state power. The United States' own first constitution, the Articles of Confederation, also proved quite feeble. Thomas Jefferson said of the Articles: "With all [its] imperfections . . . it is without comparison the best [government] existing or that ever did exist." Yet, that constitution lasted less than a decade before being discarded as ineffective.

Our next effort, although now celebrated, also nearly failed. Justice Thurgood Marshall said that the Constitution drafted by the Framers "was defective from the start, requiring several

amendments, a civil war, and momentous social transformation to attain the [present] system of constitutional government.”

So let us not treat constitutions as talismans that cure all ills plaguing modern societies. Yet, let us also recognize that they can provide a framework of understanding; a blueprint for achieving the best promises of humankind. It remains a principal function of modern constitutions and other basic charters to prescribe rights and responsibilities, both of the governors and the governed. Though imperfect, written constitutions may be the best means of protecting the rights of diverse interests and peoples.

Among the more significant constitutional developments around the globe in recent years are those respecting religious, racial, and economic rights. Three political structures are emblematic of those changes. They in turn represent important areas of influence on the world stage.

Ireland recently embarked on a major effort at modernizing its constitution and to harmonize its recognition of civil liberties with the European Convention of Human Rights. China recently enacted the Basic Law, a mini-constitution for Hong Kong, to ease that territory's reunification with the mainland, and in the process respect its unique economic system.

South Africa too, just enacted a new constitution, which not only reorganized that country's political structure, but pledged respect for human rights.

These three areas have more in common with one another, and with the United States, than simply declaring and protecting rights through constitutional means. The United States, Ireland, and South Africa are all former colonies of Great Britain, and in five short months, the same can be said for Hong Kong.

Perhaps Britain, with its unwritten constitution, has endowed its children with a legacy of constitutionalism and a respect for the rule of law. We will explore some of that today by looking at the new and evolving constitutional structures in Ireland, Hong Kong, and South Africa.

Our panelists are more than eminently qualified to describe these elements to us—they have also been participants in their respective processes. Thus, for them, history most assuredly did not end in 1989, nor does it end with the realization of constitutional change. In these closing moments of the twentieth century, we are

caught in the current of constitutional history. Today we look at three of its streams.

## II. IRELAND: ATTORNEY GENERAL DERMOT GLEESON\*\*\*\*

PROFESSOR KARL MANHEIM: Dermot Gleeson is Attorney General of Ireland. Mr. Gleeson was born in Cork and now lives in Dublin. He earned his B.A. and LL.M. from University College Dublin. Before being appointed Attorney General in 1994, Mr. Gleeson lectured in constitutional law and was in general practice concentrating on commercial and constitutional law. As Attorney General, he has represented the Irish government on numerous occasions in the Irish Supreme Court, at the European Court of Human Rights in Strasbourg, and at the Court of European Communities in Luxembourg. Mr. Gleeson is also a member of the Constitution Review Group, the body charged with proposing changes to the *Bunreacht na hEireann*, the Irish Constitution adopted in 1937. The Irish Constitution has been amended before, such as in 1972 when its reference to the "special position of the Catholic Church" was deleted by a large majority in a popular referendum.

Yet, further changes were seen as appropriate, especially in light of Ireland's entry into the Common Market and its acceptance to the European Convention on Human Rights. Thus, in 1995 the government stated "it was time for a fundamental review of [the constitution's] relevance and functioning." The Ireland Constitution Review Group was appointed, to "review the constitution and, in light of this review, to establish those areas where constitutional change may be desirable or necessary."

Within a year the Review Group submitted a 700 page report. Foremost among its recommendations were matters relating to the changing roles of government, family, church, and individual rights. Perhaps most importantly, the report recommended strengthening the Supreme Court's power to review legislation so as to further safeguard constitutional rights.

We are most fortunate to have with us today the Attorney General of Ireland, Mr. Dermot Gleeson.

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\*\*\*\* Dermot Gleeson is Attorney General of Ireland.

ATTORNEY GENERAL DERMOT GLEESON: Members of the judiciary, ladies and gentlemen, on the 31st of January 1922, 75 years ago to this day, the first Irish Attorney General to be appointed by an Irish government took office shortly after the establishment of the independent Irish state. I would like to express my appreciation for the opportunity to address you in such august company on a day that is historically significant for the holder of the office of Attorney General of Ireland.

The topic is the current state of Irish Constitutional protection of religious minorities. Before moving to that topic some introductory observations are appropriate. Ireland became independent in 1922, and a new constitution was adopted in 1937 by a referendum of the people. A root and branch review of the thirty-seventh Constitution was recently conducted largely by academics and practicing lawyers. The Constitution Review Group, to which Professor Manheim referred and of which I had the honor to be a member, published its work in 1996. I make some further references to that review in the course of this address.

Ireland is a common law country, and because the Irish legal system divided from the British only seventy-five years ago, a great deal of our law is quite closely comparable to the British law. For instance, our contract and tort law is closely comparable to the British contract and tort law. An Irish barrister would readily resort to British textbooks on those topics. In the area of constitutional law, however, because of the absence of a written constitution in the United Kingdom, resort to British authorities is virtually pointless. Accordingly, for the last fifty years it is to the constitutional jurisprudence of the United States of America that the Irish courts have principally looked for guidance. This task has been considerably simplified over the last ten or fifteen years, primarily because of the increased accessibility of large quantities of U.S. constitutional law. This accessibility is due to on-line services such as Westlaw, Lexis and the Internet.

I think Irish lawyers are proud that many of the provisions of the Irish Constitution can trace their origin to the U.S. Constitution and beyond that to the Scottish enlightenment. At the other end of the historical scale, however, we can detect that parts of our 1937 constitution have served as a model for the draftsmen of a number of other post-colonial constitutions in former British terri-



tories. Perhaps most notably in the Constitution of India, the world's largest democracy.

Article 27 of the International Covenant for Civil and Political Rights of 1966 is frequently used as a model in the drafting of modern constitutions when they are dealing with the question of minority protection. Notably, the Irish Constitution does not expressly protect minorities; all guarantees are rendered as guarantees to the individual. The foundation stone is contained in article 40, section III, and it provides that "the State guarantees in its laws to respect and as far as practicable by its laws to defend and vindicate the personal rights of the citizen." This article is variously equated with the 9th, or the 5th and 14th amendments of the U.S. Constitution.

Equally important is the provision regarding equality, article 40 section 1. It provides, "all citizens shall as human persons be held equal before the law." The principal focus of the observations this morning, however, is article 44, which is entitled simply "Religion." It is an article which is complex, or at least, seems complex in comparison with the rather simple terms of the 1st Amendment of the U.S. Constitution. It has essentially seven provisions. I will paraphrase them as follows:

First, an acknowledgment that the homage of public worship is due to almighty God and that the state shall respect and honor religion.

Second, a guarantee to every citizen a freedom of conscience and the free profession and practice of religion subject to public order and morality.

Third, a guarantee that the state will not endow any religion.

Fourth, a prohibition on state discrimination on the grounds of religious profession, belief, or status.

Fifth, a guarantee that state aid for schools which is specifically provided for shall not discriminate between schools of different religious denominations.

Sixth, the assurance of the right of every religious denomination to manage its own affairs and to acquire and manage its own property.

And last, a guarantee that property will not be compulsorily acquired without compensation.

There is one other provision which is worth mentioning. It is

a constitutional convention which does not appear in the written text. This is to the effect that in the composition of the courts, of the five—now expanded to eight—justices of the Supreme Court, there will always be one member who is not a member of the majority faith, meaning one member will not be a Catholic. In addition, in the High Court, where there are twenty judges, the same convention will apply.

Catholics comprise about ninety-five percent of the population of Ireland. At present there is one member of the Supreme Court and four members of the High Court, who are not Catholics. That is to say a Presbyterian, two Anglicans (members of the Church of Ireland) and one member of the Jewish faith.

In the context of the U.S. Constitution it has been observed that “there is a seemingly irresistible impulse to appeal to history when analyzing issues under the religion clauses.” That tendency in this jurisdiction, the United States, is criticized as being unfortunate as there is no clear history regarding the meaning of the clauses. In the Irish context the appeal to history, I am afraid, is also irresistible since the drafting of the constitution in my country is rather better documented and not shrouded in the mists of time in the way yours is. Giving into these historical urges is perhaps more convenient in my country than in yours. Let me start on this aspect by going back sixty years.

In 1936, the year before the adoption of the new Irish Constitution, the census of the republic showed that there were 2.7 million Catholics and about 200,000 persons of other denominations, the great majority being Anglican. Prime Minister de Valera consulted the clergy of all the major churches on the wording of various aspects of the Constitution, but specifically in relation to the religious provisions. The head of the Catholic Church in Ireland insisted that the constitution include a provision that the Catholic Church was “the one true Church.” Such recognition did in fact appear in an early draft. The Prime Minister however, recognized even in the 1930s—and that’s a very different age from the 1990s—that this would be neither permissible nor possible. He decided that what was needed was some sort of formulation which would be satisfactory to all major churches. He faced a considerable problem of drafting, described in a memorable phrase by one commentator as “an attempt to put tattoos on bubbles.” Prime

Minister de Valera came up with the new version which did not refer to one true church and which was eventually approved. This new version gave recognition to the "special position" of the Catholic Church and recognized all other churches, including Judaism. This was deemed acceptable by all the churches except the Catholic Church, which was the only dissenter from that formulation.

This was a political problem for de Valera, and he solved this with an astute piece of politics which, again is something that rings from another age. He sent a representative to see Pope Pius XI and to put the formulation to him. The Pope reportedly said, "I don't approve, neither do I disapprove. We shall remain silent." That in itself was considered a sufficiently amber light for the matter to proceed. Now that's a story from a different age, and that sort of consultation would not likely occur in the 1990s.

It is striking that from the outset the judiciary resolved that even this reference to the special position of the Catholic Church would not be a mechanism for granting any preferential treatment to Catholics. This was first established in a 1952 Supreme Court decision, *In Re Tilson Infants*. That case concerned the validity of an ante-nuptial agreement, entered into by parties to a mixed Catholic and Protestant marriage. At that time the Catholic Church insisted that the children of a mixed marriage be brought up as Catholics. That topic was a point of extreme sensitivity in Irish society, primarily due to the shortage of marriage partners for members of the other faiths. Prior to *Tilson*, the applicable Irish common law rule, stated that the children take the religion of the father.

The High Court decided that in light of the constitutional reference to the special position of the Catholic Church, it would uphold the ante-nuptial agreement, change the common law rule, and enforce the apparent agreement of the marriage partners to rear all the children as Catholics.

The Supreme Court, however, did not permit that development. It ruled-out that line of argument. The single non-Catholic judge on the Court, Justice Black, said as follows:

Ever since this constitution was enacted I was firmly convinced, as I am still, that in respect of all legal rights and privileges, is admitted of no discrimination as between persons of different

religions. If I had thought it did, I never could have made a public declaration that I would uphold it; and if in fact it did, I imagine it would gain for us an unenviable distinction amongst the democratic peoples of the world.

The first Constitutional review occurred in 1967, and it recommended that the reference to the special position of the Catholic Church be deleted. It found that the reference had no legal effect, conferred no privilege, offended non-Catholics, and was a useful weapon in the hands of those who were anxious to emphasize differences between the Republic and Northern Ireland. By a very considerable majority in a referendum in 1972, this provision was deleted.

I now turn to some of the individual provisions in article 44, as it now stands to which I have made some short reference. The first provision contains the slightly cryptic phrase: "The homage of public worship is due to almighty God."

One professor of constitutional law has observed that the overwhelming allegiance to religion in Ireland is mainly, though not exclusively, a matter of private practice. For instance, Ireland's coinage does not bear any message that could be regarded as religious, yet there are many accepted public manifestations of religion. It seems probable that many of those public manifestations, such as the "Angelus" being sounded on both the radio and television, may seem strange to people coming from outside the country. It's likely, however, that such practices are likely to remain, because of the provision in relation to homage being due to almighty God. There would be different considerations, however, if these manifestations involved funding because then they would run contrary to the prohibition on state endowment.

The recent Constitutional review found that these provisions were unclear and that words of this kind can give rise to misunderstandings, cause needless offense, and that they are difficult for members of some religious minorities and nonbelievers. The perception that this religious language can give rise to difficulty even for Christians of other faiths is confirmed by a quotation, which appears in an interesting legal study conducted in Ireland in 1995.

In 1994, in the wake of I.R.A. and Loyalist cease-fires, the British and Irish governments entered into a joint declaration. Thereafter, a Forum for Peace and Reconciliation was established

in Dublin. One of the studies this Forum commissioned was a study of the alleged barriers to better understanding, which arose in the Southern legal system. The study was commissioned by Unionist lawyers in Northern Ireland—persons of a Unionist and Protestant tradition. The commission found that the Irish Constitution contained several phrases—undoubtedly one of which was this article—which grated upon the Northern Unionists. It pointed out for instance, that Presbyterians would not be sympathetic to the sort of language that is used. For these, and a variety of other reasons, the constitutional review group favored a simpler statement that the “State guarantees to respect religion.”

It has been argued from time to time that the natural law origins of some of the constitution’s drafting represents a threat to secular life in Ireland. Those concerns have been substantially laid to rest by a decision of the Supreme Court given in 1995, in which the Chief Justice, in a judgment which was supported by the full membership of the Court, indicated that natural law has no priority position in the laws of the Irish state.

Freedom of religious conscience is guaranteed in what I think, are fairly classic terms as follows: “Freedom of conscience and the free profession and practice of religion are subject to public order and morality guaranteed to every citizen.” That’s a provision that has worked well. The suggestion in the review body’s report is that perhaps there should be a movement closer to the language that is now very common in Europe, giving the same guarantee as that to be found in the European Convention on Human Rights.

The provision against endowment is of significance and interest I think to American lawyers: “The state guarantees not to endow any religion.”

This provision does not expressly prohibit the establishment of a religion. The constitutional review group believed that almost certainly it does prohibit establishment, but that it fell short of recommending a formal nonestablishment clause fearing that absurd results might occur in a society such as Ireland. I think it’s not giving much away to say that the review group had in mind some of the difficulties encountered in the United States, in decisions in relation to establishment. Decisions such as *Lynch v. Donnelly* where difficulties were raised in relation to a nativity scene being displayed in a public place. As well as, *County of Al-*

*legheny v. American Civil Liberties Union*, where the U.S. Supreme Court said the government was entitled to celebrate Christmas but, a municipality may not go so far as to exhibit a crib in a courthouse bearing the legend "*Gloria in excelsius Deo.*" Those are difficulties that would not arise in Ireland, and I think the review group was anxious not to entertain such complexities.

A further controversial issue in Ireland involves another aspect of endowment, and one which is of some difficulty: To what extent should institutions such as schools and hospitals, which retain their religious ethos be eligible for public funding?

In 1922, the state did not often play a role in the provisions of health and education. In our country, as in many other countries including the United States, it was left to religious organizations to provide what were in truth essential facilities such as schools and hospitals. With the growth of state funding of these institutions, questions concerning the application of the constitutional prohibition on endowment arose.

The review group raised the controversial issue of whether hospitals with a religious ethos which received public funding can constitutionally refuse to conduct lawful medical procedures. The review group offered the view that there could be no constitutional objection to the state funding of a school or hospital run by religious orders, unless the school or the hospital were to discriminate on religious grounds, for instance, in relation to admissions or employment.

On the other hand, if no preference could be given by the administrators to their co-religionists, for instance in a school, the institution might find it difficult to maintain the religious ethos. The review group proposed that a clause be inserted providing that publicly funded institutions, which retain a religious ethos, should not be barred from public funding—provided there is no discrimination on grounds of religious practice or belief—except to the extent that the institution could demonstrate that it was necessary to maintain its own religious ethos.

The nondiscrimination provision is as follows: "The state shall not impose any disabilities or make any discrimination on the grounds of religious profession, belief, or status."

That provision was tested in the leading case of *Quinn's Supermarket v. Attorney General*, decided in 1972. The Supreme

Court considered the legislative measure which granted a favorable dispensation to certain Kosher shops. The measure allowed them to open on Sunday, even when this was forbidden for other traders. The Jewish population in Ireland is less than 2000. It was held, however, that a literal application of the nondiscrimination rule would tend to work against the free profession and practice of religion, and in coming to that conclusion the Supreme Court gave lengthy consideration to U.S. decisions in relation to the balancing in the nonestablishment and the free exercise clauses. The decisions of: *McCulloch v. Maryland*, *Sherbert v. Verner*, and *Braunfeld v. Brown* were looked at. In addition, the judgment of Justice Brennan in *School District of Abington Township v. Schempp* was taken as being a suitable statement of the principles in this area for adoption into Irish law. One of the quotations from Justice Brennan's judgment, which I am sure you will be familiar with, was as follows:

The fact is that the line which separates the secular from the sectarian in American life is elusive. The difficulty of defining the boundary with precision inheres in a paradox central to our scheme of liberty. While our institutions reflect a firm conviction that we are a religious people, those institutions by solemn constitutional injunction may not officially involve religion in such a way as to prefer, discriminate against, or oppress a particular sect or religion.

And the Irish Supreme Court, adopting these principles went on to decide that:

It would be completely contrary to the spirit and intendment of the Irish constitution to permit the guarantee against discrimination on the ground of religious profession to be made the very means of restricting or preventing the free profession or practice of religion. The primary purpose of the guarantee against discrimination as was stated was to ensure freedom of practice of religion.

The Supreme Court held that the legislative measure at issue, while discriminating in favor of Jewish shops, contrary apparently to article 44.2.3, was nonetheless necessary and constitutionally sound. It was needed to allow the free exercise of that religion in accordance with the antecedent article 44.2.1.

State aid for schools is another difficult area. The constitu-

tional provision is as follows:

Legislation providing state aid for schools shall not discriminate between schools for the management of different religious denominations nor be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at a school.

This article repeats the principle of nondiscrimination and specifically applies it to an educational context.

It is noteworthy in this connection that there is a shift in our census figures in relation to religious practice. The great majority of the population, about 3.25 million, describe themselves as Catholic. There are just over 100,000, perhaps 120,000 members of other Christian faiths, and there are an increasing number of persons in other religions, about 40,000; persons having no religions, about 70,000; persons unwilling to state their religion, about 90,000. It is possible, that with these changes in society and increased secularization that these provisions in relation to endowment of schools will become more important. Requirements, however, that a school should be prepared to accept pupils from denominations rather than their own and to have separate religious instruction would seem neither unreasonable nor unfair.

Finally, I briefly refer to the guaranties of autonomy, entitlement to hold property, and prohibition on compulsory acquisition of religious property without compensation. Those provisions are now in force. They do not give rise to difficulty and no substantial changes are proposed in them.

Let me try now and draw some of these threads together. A careful analysis of the provisions of article 44 indicates that it has worked reasonably well. Key aspects, namely the guarantee of free practice of religion, and the twin prohibitions against endowment of religion and discrimination on the grounds of religion are far reaching and comprehensive. An accusation that the Irish state has a confessional ethos is in my view unwarranted; and insofar as it has been warranted in the past, I do not believe that the constitutional provisions have been to blame. The Supreme Court as I have indicated, has resolutely turned its back on sectarian interpretations, and I have referred you to decisions in the 1950s and the 1990s that reflect that view.

It remains a fact, however, that religious divisions are of key



political significance in Northern Ireland and concerns have been expressed by responsible persons in the Unionist tradition of some of the language used in the 1937 constitution. The Dixon Study, to which I referred earlier, offers a view, not one necessarily that I would share, from a Unionist perspective in the following terms:

While for the most part the constitutional and legal systems in the South do not present significant obstacles to better relations between the two parts of Ireland, if there were ever to be a move toward a situation beyond what can simply be described as better relations, this would require the adaptation of several features of the southern constitutional and legal systems in order to prevent them from endangering the stability of that new situation. In short the closer one comes to a union of the two parts of Ireland the more difficult it is to describe the troublesome features of the South as mere flies in the ointment. They gradually become real spanners in the works.

It remains to be seen as to whether this is a fair assessment. My own judgment is that it significantly underestimates the nonsectarian character of the constitutional provisions.

Nonetheless, and in conclusion, it behooves us to bear in mind the statement of Jonathan Swift, author of *Gulliver's Travels*, a Dublin writer of great distinction who said, "We have just enough religion to make us hate, but not enough religion to make us love one another." Now I don't accept the validity of that rather depressing analysis, but it's clear nonetheless, that in the Irish context it is of the utmost importance that the Constitution and particularly the provisions touching on religion should not serve to prefer or disadvantage any religion. They should instead, continue to promote the interests of tolerance, peace, and reconciliation between persons of every religion. Thank you very much for your attention.

**PROFESSOR MANHEIM:** Listening to Attorney General Gleeson's remarks, it struck me how similar many of the issues are between the United States and Ireland. It is unfortunate, I think, that the U.S. Supreme Court has never, to my knowledge, cited a decision from the Irish Supreme Court or indeed any other foreign tribunal. Whereas Ireland appears to rely rather heavily on U.S. precedent. For instance, just listening to Mr. Gleeson's description of the Irish Justice, Mr. Black, and his belief that no discrimination

means *no discrimination*, reminds me of *our* Justice Black, who is most noted for his view that the First Amendment, which says Congress shall make no law, means *no law*.

Perhaps we can follow the Irish Court's lead as we confront some of these issues. The Supreme Court this term is considering the constitutionality of the Religious Freedom Restoration Act, passed by Congress just a couple of years ago.

Mr. Gleeson also mentioned that he conducts part of his research over the Internet. Indeed, I do too. I found a lot about him on the Irish government's home page. For those of you who are interested it is [www.irlgov.ie](http://www.irlgov.ie).

### III. HONG KONG: HONORABLE BENJAMIN LIU\*\*\*\*\*

PROFESSOR KARL MANHEIM: On June 30, 1997, a century and a half of British rule over Hong Kong will come to an end. On that day, the territory will be reunited with China, from whom it was won during the Opium War in 1842. Reunification will occur pursuant to the Basic Law, a mini-constitution that was created by the Peoples' Republic of China under a Joint Declaration with Britain. It creates the Hong Kong Special Administrative Region as a self-governing body and provides guarantees to ensure economic rights. Indeed, the Basic Law may contain the most extensive description and codification of capitalist features ever recited in a constitution, requiring that personal property rights be protected and that the government maintain Hong Kong's status as a leading finance center.

China has promised to respect Hong Kong's economic system for at least the next fifty years. While the promise of "One Country, Two Systems" may work well in securing economic rights in Hong Kong, many in the West are anxious about political rights in the territory come July 1, 1997.

Indeed, in recent days, the western press has taken China to task for rolling back Hong Kong's Bill of Rights. As July 1, fast approaches, further criticism may be expected. It is well to remember, however, that Britain ruled Hong Kong for 150 years before providing its colony with a Bill of Rights or self-rule. Liberties conferred only on the eve of reunification may take some time

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\*\*\*\*\* Honorable Benjamin Liu is a justice on the Hong Kong Court of Appeal.

to settle in. For its part, China will face a delicate balance under the Basic Law in preserving "One Country, Two Systems." We are most fortunate to have with us today the Honorable Benjamin Liu, who will help us understand that balance.

Justice Liu is a Hong Kong native. He attended Jesuit High School in Hong Kong, Wah Yan College, and Hong Kong University. He then studied at the Inns of Court in London, and was called to the Bar at Lincoln's Inn. He was appointed Queen's Counsel in Hong Kong then, District Judge, then Superior Court Judge, and finally Justice of the Court of Appeal, Hong Kong's Supreme Court.

HONORABLE LIU: Including two of my grandchildren, who were born in Hong Kong, my family has been in Hong Kong for over five generations. My fathers were here before Hong Kong's cessation to Britain. That alone would qualify me to speak on my topic today: Post Mid-1997 Hong Kong Private Economic Rights in the Context of "One Country, Two Systems."

In five months, China will resume exercise of her sovereignty over Hong Kong. Let me begin with some background history. After the Opium War, the territory was ceded to Britain in 1842. In 1860, the apex of the mainland Peninsula known as Kowloon was ceded. In 1898, the remaining portion of the Peninsula—including more than 200 small islands cohesively called "the New Territories"—was leased by Imperial China to Britain for a term of ninety-nine years expiring on June 30, 1997. These arrangements have always been regarded by China as inequities flowing from unequal treaties. July 1, 1997, is the date fixed for China to resume sovereignty over her domain.

Some four years before the former British Prime Minister Thatcher visited China in September 1982, the concept of "One Country, Two Systems" for resolving the Hong Kong question had been structured by Mr. Deng Xiaoping. Negotiation was successfully concluded by the signing of the Joint Declaration and Three Annexures on September 26, 1984. The Joint Declaration was formally ratified on May 27, 1985.

Hong Kong Island, Kowloon and the New Territories cover an area of 1095 square kilometers. The area of Hong Kong Island is only 86.25 square kilometers. Our population today stands at

over 6.0 million. By February 1997, it is expected to reach about 6.3 million.

What does "One Country, Two Systems" entail? It would allow Hong Kong to remain a capitalist society as a Special Administration Region (SAR) of the People's Republic of China (PRC) and continue to practice capitalism. No socialist system or policies will be introduced to Hong Kong. Mainland cadres will not be dispatched to the SAR and Hong Kong will enjoy a high degree of autonomy. These pronounced principles and policy regarding Hong Kong will stay unchanged for fifty years. On November 25, 1996, in Beijing, President Jiang Zemin reassured our Financial Secretary, Mr. Donald Tsang that:

China would abide by the principle of "One Country, Two Systems" and that management of the Hong Kong economy would be an entirely Hong Kong affair ... there would be additional guards placed on the border during the transition period to make sure that there would be no influx of mainlanders into Hong Kong.

There is every good reason to expect the pragmatic "One Country, Two Systems" philosophy to run over its first fifty years. PRC has expressed her concern over possible upheavals in Hong Kong during the fifteen years (1982-1997) running up to June 30, 1997, but she has no misgivings about Hong Kong's success after mid-1997.

No self-respecting Chinese has taken exception to the resumption of sovereignty over Hong Kong. It is not unnatural that changes would arouse anxieties which have been deeply felt in some quarters and openly aired by most. In the past, many descended upon Hong Kong as a haven, and any risk of turbulence, whether real or imagined, would jog unpleasant memories and tend to unsettle confidences. In the colonial era, a sizable group had grown to question their own adaptability in the process of transformation from the 150 year quasi-overseas Chinese status. But our most vocal critics against Beijing have vowed to stay. They have good cause to be unfeared. At a meeting of the Central Advisory Committee held on October 22, 1984, Mr. Deng Xiaoping made it openly known that after 1997, people in Hong Kong would be free to even hurl abuse at PRC or his Party. We were also reminded by Mr. Deng that recanting promises is tradi-

tionally held by every Chinese in abhorrence.

Most of these Hong Kong people troubled by 1997 have the resources for realizing their options. A great many have emigrated for personal or economic reasons, but many more have decided to stay. There is also a hard core who are determined to stay to make whatever contribution they can. Of our 6.3 million, by far the bulk will be here on July 1, 1997, and beyond.

A vast number of those who have emigrated retain a base in Hong Kong, and the country to which they have emigrated can expect little real integration. They left their hearts in Hong Kong. Their wish to absent themselves from Hong Kong is transient, but the funds lifted out of Hong Kong have provided the much needed cashflow in other continents. In the interim, our property market has soared and realty acquisitions overseas have increasingly diminished in significance for those who have not really uprooted themselves. These Hong Kong families, whose breadwinners are unkindly called "astronauts" enjoy the unenviable luxury of a thought-provoking period overseas. Sadly, some family relationships suffered dearly in the forced intermittent separation. The traumatic experience has a positive side—it broadens their horizons. The not altogether unforeseen set-backs in the new land have gradually hardened their will to face challenges ahead back in their home land. After an international exposure, they become a more sophisticated and better instructed work-force. Ironically, like the 1950/1960 embargo, the Korean war, the Vietnam conflict, the political upheavals in the Pacific rim and this time, the 1997 jitters, the Hong Kong people have come out of it all in better shape than before.

Negotiation for the resumption of sovereignty over Hong Kong was protracted, spanning almost two and a half years. Those who have emigrated have their attention divided between the business they leave behind and the family they send overseas. They are less than receptive to social and cultural differences in the new land. Without total commitment, little genuine effort is made to adapt. At the same time, China opens up and more people from Hong Kong constantly cross the border for business and pleasure. Mutual understanding has escalated by leaps and bounds. Hong Kong people begin to realize the potentials of the Mainland and the feasibility and reward of their capitalistic contri-

bution. The rate of departure wanes. In a recent report in the Hong Kong Standard, emigration from Hong Kong is said to have dipped to its lowest levels since mid 1989. Of the 420,000 emigrated between 1984 and 1993, at the very least 12% have returned, and more returnees are expected. The down-trend on the economic front and poor employment prospects overseas drive many to have second thoughts and come home. It is an encouraging sign that the influx of expatriates in 1995 exceeded the number of emigrants. When the working generation return, the young and the old follow suit in most family units. The pragmatic result of all this is that Hong Kong people have learned to come to grips with whatever the future holds for them after 1997.

There has been ample time for rationalization and reflection. Hong Kong people are shamelessly realistic. Post 1997 Hong Kong, after all, will generate no unusual or incommensurate hazards. From foreign lands these Hong Kong people bring back with them a wider perspective. They acquire an in-depth understanding of the working of a foreign mind. As a result of their exposure to extraneous social virtues and values, they have learned to be modest and become highly receptive, better informed, acutely focused, less self-centered and more tolerant. They treasure their own identity, but they have made new friends, gained more contacts and assumed a relatively fresh outlook in life and business. In this long trying period, many have chosen to commit themselves to Hong Kong. Exodus is now practically confined to the irresolute. What all this boils down to is this: Hong Kong retains its core of a relentless work-force which is no longer over-sensitive to the imponderables of 1997, but well attuned to international rapport, further reinforced by overseas input, better motivated and totally resolved to face whatever will be in store for them upon resumption of sovereignty.

Hong Kong shares with the Mainland stability, for which Hong Kong has no less a guarantor than the President of the PRC, Mr. Jiang Zemin. President Jiang proclaimed in an interview with the French newspaper *Le Figaro* on September 7, 1996: "I can make it clear to all people who are following developments in China that China is stable now, and will certainly maintain long term stability in the future." After all, the PRC which is described by the New York Times as major military and economic power is forecast to become a democracy around 2015 when her per capita

GDP reaches U.S. \$7000, the level at which democracy everywhere has become stabilized.”

Hong Kong's performance owes much to the resilience and creativity of her people and the paterfamilia support, in all shapes and forms, from the Mainland. The ability to retain our workforce for an invigorating and high-yield output is a pillar of our stability and prosperity which will continue to sustain our private economic rights in the run up to July 1, 1997 and beyond. Hong Kong's private economic rights may be said to have passed international scrutiny in flying colors, and we must examine how these rights would fare after June 30, 1997 in the SAR.

Would the subsisting private economic rights be eroded after 1997? Private economic rights in Hong Kong will certainly not be less defended than the Mainland's direct or indirect investments in this territory. As of September 1996, there were 1800 China-backed enterprises in Hong Kong with paid-up capital of over U.S. \$42.5 billion, monopolizing 22% of Hong Kong's export trade. Up to then, the PRC operated 19 banks, 3 banking representative offices and 3 Deposit Taking Companies in Hong Kong. There were 55 PRC-based companies quoted in the Hong Kong Stock market, representing 6% of our stock market equity. The PRC took 21% of our insurance market, 6% travel trade and 12% construction business. For a country striving to make up for the time lost during the Cultural Revolution, these involvements are no mean commitments to the Hong Kong economy.

There is little fear that Hong Kong will be overtaken by Shanghai. “No matter how rapidly Shanghai grows, it will still practice socialism,” so Mr. Lu Ping, PRC's Director of Hong Kong and Macau Affairs comments, and by contrast “Hong Kong will maintain the capitalism system.” As reported in *Business Week*, Professor Rudi Dornbusch of the Massachusetts Institute of Technology is in favor of opening up “a new U.S./Chinese relationship built on accepting China as it is . . . if only it is because the United States accepts China as the single most important player in Asia and wants to treat it on that basis.” The Professor is alive to PRC's enormous economic revival and her gradual but cautious lifting of prohibition against the public “getting into making money and going ahead.” The PRC's economic policy is irreversible within and without her boundaries, making a special im-

pact on Asia at which Hong Kong is situated. The PRC has demonstrably nurtured and developed her Hong Kong interests under the concept of "One Country, Two Systems" as it is to be applied to Hong Kong. Interference with private economic rights would hardly be conducive to good management and promotion of these Mainland interests. Why then should private economic rights in Hong Kong feel threatened by any whim or arbitrariness of government?

If the momentum of these PRC interests in Hong Kong is not to be impeded or hindered by socialist conventions closely observed in China, Hong Kong's private economic rights will surely likewise be left unhampered in the scenario in which they have hitherto prospered. Hong Kong people are enterprising and second to none in their entrepreneurial endeavors. Our men and women lack no pioneering spirit. There is no conceivable reason why Hong Kong cannot continue to rely on the quality of her people and the goodwill of PRC to successfully repel or fend off disruptive influences. It would take more than an unlikely risk of PRC reneging on her promises to Hong Kong to edge her people from the seat of success. Even ignoring the PRC's exploding economy and emerging importance on the world stage, it is a real comfort to us that the PRC's track record of honoring her commitments is good.

The volume of Hong Kong's private economic interests will nevertheless continue to grow even should some of her existing private economic rights be irresponsibly put at risk by influences without. Given our ability to innovate, the growth would not stop in an adversity if only some avenues were to be left open. We have our in-built resolute vigor and resilience which have taken us through the most turbulent times in the past. Viewed in that light, no change, however drastic, will likely cause much damage to our economic environment which is conducive to the well-being of these rights after June 30, 1997. Also, judged by our past experience, it is improbable that set-backs of any magnitude would totally halt or slow our progress.

In addition to all these encouraging scenarios, our private economic rights will not cease to enjoy an independent Judiciary, absence of executive pressure, a fearless and unbending Bar, an efficient and apolitical civil service, our relatively corruption-free



law enforcement agencies, a low tax base, a stable currency, absence of a punishing exchange control with RMB becoming soon freely convertible, a sound fiscal system, a healthy reserve, a vast number of small and diversified businesses immune or otherwise freely adaptable to almost any form of caprice and a peaceful cosmopolitan community sensitive to world-wide opinion. In addition, Hong Kong will be linked to the resolution of the Taiwan question. For the Chinese Nation, every effort is being made to doubly ensure that Hong Kong and its private economic rights will be sustained. Hong Kong will be a litmus test for an early reunification with Taiwan. It is important that Hong Kong not be allowed to under-perform or be perceived to have under-performed.

Hong Kong will be governed by the Basic Law, a mini-constitution. The Basic Law took more than four years to draft. In April, 1990 it was passed. It will be in force from July 1, 1997. It called for the most elaborate legislative deliberation within the given time frame. Hong Kong has had more than seven years to prepare for its operation. It is a law endorsed by both the PRC and United Kingdom as being conducive to the continued success of Hong Kong for at least fifty years. It is not to be overlooked that Hong Kong's stability and prosperity will be underwritten by a sovereign power more caring than her present colonial master. Above all, it is upon the unceasing contentment of the individual investors in private economic rights that prosperity and stability of the Hong Kong SAR will so vitally depend. It would not be in the interest of PRC to exert any negative supervision over Hong Kong. There is goodwill on all hands to sustain our system which will continue to accord a place of honor to private economic rights. I will highlight some features in the sustained growth of Hong Kong's private economic rights.

#### *A. Entrenched Characteristics In Attitude*

It is no exaggeration to say that Hong Kong people have become increasingly vocal and unwholesome meddling with our private economic rights would not be kindly tolerated. Cantonese are, to my mind, absolute individualists, and it is highly improbable that all of them could be fooled all the time. The other attribute of indigenous Hong Kong people is their respect for law and order and their expectation that the Executive will be no less law-

abiding. The use of judicial review for questioning Government decisions is commonplace, and the Hong Kong authority has acknowledged the real need for such crucial intervention.

### *B. Independent Judiciary*

In all my years in the law, there has not been any proven corruption allegation against a judicial officer. This is no idle boast and one which could be made in very few countries, developed or under-developed. It is common knowledge that compared with the private sector the employment terms of judicial service are less than attractive, but the dedication amongst my colleagues is traditional; their pride of contribution in service ranks supreme. The constant extra effort put in by each is unrivaled. Hong Kong is served by a group of fine judges. I wish to pay a special tribute to my colleagues at all levels in our hierarchy.

Executive pressure on judges is nil. Pressure from any quarters will be publicly condemned. Hong Kong does not have an overbearing executive and she lives up to her constitutional image of separation of powers.

### *C. Fearless and Responsible Bar*

The Bar always has the courage of its conviction. A deliberate hostile stance is rare. Its views command respect. The Bar is fearless and responsible. The Bar's first retainer is its defense of what is just.

### *D. Efficient Civil Service*

The civil service stands free from political and commercial institutions. Hong Kong has a highly reputable and credible, dedicated civil service.

### *E. Relatively Corruption-free Law Enforcement Agencies*

Hong Kong owes much to the Independent Commission Against Corruption (ICAC) and public education for its clean image.

### *F. Outstanding Achievement*

Hong Kong has zero government debt and our Foreign Exchange Reserves stand at over U.S. \$53.6 billion, which has been

increased by 15% to U.S. \$63 billion within a year, being the seventh largest in the world. According to Standard and Poor's, Hong Kong's annual revenue is sufficient to redeem her \$83 billion general borrowings in slightly over eight years. In terms of economic growth, we have had a proud record of a continual rise in Gross Domestic Product (GDP) for the past thirty years. The United States and the United Kingdom have had not more than six such years. In 1995, per capita GDP reached U.S. \$23,200, exceeding the United Kingdom and Australia. We are reported to have reached U.S. \$25,000 in 1996. Standard and Poor's gave Hong Kong Foreign Currency Borrowing an "A" rating. We ranked eighth in trading in 1994, although we ranked ninety-sixth in population size. In 1995, we had 10 million visitors, and our Convention and Exhibition Center catered 2200 events with 350,000 participants. An extension to the complex will be opened in late 1997, and 45% more facilities will be made available.

#### *G. Sound Fiscal System*

A sound fiscal system is demonstrated by our sound reserve and an official long-standing *laissez-faire* policy, liberally administered with subdued flexibility. Hong Kong is one of the world's leading financial centers; it is the fifth largest in terms of the volume of external banking transactions, the fifth largest in terms of foreign exchange transactions, and the eighth largest in terms of stock market capitalization. In addition, we have the added advantage of a local stable currency which has for many years been linked to the U.S. dollar.

#### *H. Trading Units in a Cosmopolitan and Multi-Cultural Society*

The host of small and diversified businesses run by independently minded entrepreneurs, form the backbone of our society. They are more versatile and flexible, which makes us less vulnerable to unpredictable hindrances of any kind.

Each of us has learned to be tolerant of different races, creeds, beliefs and backgrounds. We mingle well in this oriental melting pot at the mouth of the Pearl River. We are fortunate to comprise the best of every culture in our community. Hong Kong is one of the safest cities. It has an overall crime rate at roughly the same level of Singapore and lower than that in Tokyo, London

and metropolitan cities in the North American continent.

### *I. International Link*

We have the largest container throughput rate. Our present pinhead-size airport is the second busiest in terms of international cargo throughput and third busiest in terms of passenger throughput. Our new airport will be ready in late 1997 and a higher throughput rate will surely be attained.

### *J. Amenability to International Opinion*

Reports in the media, electronic, satellite or otherwise are in abundance and dynamic. A balanced degree of press responsibility is generally maintained. This has served Hong Kong well, particularly in the time running up to 1997. Widely circulated critiques in the international and local media often provide checks and balances. We are great believers in the free flow of information. We accept criticism as we welcome praise.

### *K. Litmus Test for Taiwan*

Mainland China is determined to make Hong Kong a success as a litmus test for Taiwan. Taiwan has a population of 21 million people and almost four times our potential. With the good-will of all and progressive changes made across the border, Hong Kong simply cannot fail to pile success on success. At his interview with CNN on November 13, 1996, the Senior Minister of Singapore, Mr. Lee Kuan Yew, predicted that there would be no other way for Taiwan but unification within the next forty to fifty years. The PRC leadership is more optimistic. Taiwan's unification with the motherland, however, is not expected to be imminent, and in the gradual process of PRC's resumption of *de facto* sovereignty over Taiwan, Hong Kong can ill-afford to be perceived as undernourished.

### *L. Basic Law*

Four years saw the Basic Law's promulgation. It has been sufficiently publicized and Hong Kong is more than ready to practice and cherish it. It would be in force for upwards of fifty years.

### *M. Conclusion*

In conclusion, the culture of our labor market is not going to be any different with a history of spectacular success through entrepreneurial zeal, determination and perseverance. Hong Kong will continue to be firmly buttressed by the intrinsic virtues of her ordinary working men and women. Our returnees are all the more qualified and ready to face any exigencies. For the next quarter of a century, the action will be in the Far East. Forbes has held Asia out as capable of continuing to grow faster than the rest of the world. Mr. Lee Kuan Yew's firm projection, as reported in a later issue of Forbes, is that Hong Kong could not possibly be isolated from the regional activities. In ten years Asia will be about forty percent of the world GDP in purchasing power parity because of the weight of China, and in twenty years, it will be about fifty percent of the world GDP.

I believe that the economic environment conducive to our remarkable performance will not be disrupted. The PRC has every incentive to stand by our private economic rights. Hong Kong's private economic rights will enter the twenty-first century hand in hand with PRC's and other interests here, and PRC will be ever more heavily invested in Hong Kong. Existing governmental and legal structures will be jealously guarded. Upon all these principle rests what I believe to be the indestructible foundation of our private economic rights. The Basic Law is fortified by an international guarantee of a half-century capitalist system. The PRC is proud of her unblemished record of discharging international commitments and the Joint Declaration has attained international status. There will likely be no erosion of our private economic rights. Hong Kong can rely on her people, her incredible achievements and her economic strength to withstand pressures of every description. The Governor of Hong Kong is not best known for his kind portrayal of PRC, but he concluded at an interview with Dorinda Elliott of Newsweek that Hong Kong's economy is extremely sound, and the people of Hong Kong are energetic and resilient and have got through some pretty choppy waters in the past. Secondly, this is a city in its prime. There's a great pulsing society here and a civil society.

Hong Kong now has an elected SAR Chief Executive, Mr. Tung Chee-hwa, who enjoys popular support and our confidence.

There are no conceivable reasons why our expectations should not be realized. Mr. Tung has a profound understanding of private economic rights which will be, without any doubt, well monitored under his administration. There should be no concern over our private economic rights after June 30, 1997.

#### IV. SOUTH AFRICA: HONORABLE ALBERT SACHS\*\*\*\*\*

PROFESSOR KARL MANHEIM: As he handed over the reins of power on May 10, 1994, former President F.W. DeKlerk said:

The greatest challenge which we will face in the government of national unity will be to defend and nurture our new constitution. Our greatest task will be to ensure that our young and vulnerable democracy takes root and flourishes. As I turn over the presidency to Mr. Mandela, I shall do so with the strong conviction that henceforth sovereignty will ultimately lie with [the people of South Africa] and in the Constitution.

South Africa's new constitution represents a monumental change, not merely in replacing apartheid with a multi-racial democracy, but in the nature of the constitution itself. Henceforth, constitutional questions will be decided by a constitutional court rather than by Parliament. The South African Constitutional Court wasted no time in asserting its supremacy. It refused, at first, to certify the permanent constitution, because it was out of compliance with fundamental principles embodied in the interim constitution. With those defects cured, the new constitution was approved. Although based in part on the U.S. Constitution, we have much to learn from South Africa's Constitution and its heroic efforts to attain and preserve a multi-racial democracy.

Judge Albert Louis Sachs is from Johannesburg. He received his B.A. and law degrees from the University of Cape Town, and began practicing law there as a civil rights lawyer. In 1966, Judge Sachs went into exile in England, where he completed a Ph.D. at the University of Sussex, and taught in the Law Faculty of the University of Southampton. In 1977, he became Professor of Law at the Eduardo Mondlane University in Mozambique, where he was Director of Research in the Ministry of Justice for five years,

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\*\*\*\*\* Honorable Albert Louis Sachs is a justice on the South Africa Constitutional Court.

until he was nearly killed by a car bomb in 1988. He then returned to England.

After a brief stint at Columbia University, Judge Sachs became founding director of the South Africa Constitution Studies Center in London. In 1992, the Center moved to the University of the Western Cape where he was appointed Professor Extraordinaire. Judge Sachs was appointed to the National Executive Committee and the Constitutional Committee of the ANC, and is now one of eleven judges on the South African Constitutional Court.

Judge Sachs has written extensively on culture, gender rights, and the environment. His book, *The Jail Diary of Albie Sachs*, was dramatized for the Royal Shakespeare Company and broadcast by the BBC. The BBC is now dramatizing a second book by Judge Sachs, *The Soft Vengeance of a Freedom Fighter*, which deals with his recovery from his attempted assassination.

Is it a great honor to have with us today Judge Sachs.

JUDGE SACHS: To Dean McLaughlin, in refuting the idea that history has ended, I think I have about five words regarding South Africa: *South Africa adopted a new constitution*. Five words, so many lifetimes, five hard years of intense negotiations, breakdowns, talks about talks about talks about talks, just to get the whole thing going. Then talks about talks about talks to remove obstacles to negotiations, and then talks about talks to get the format for negotiations, and finally talks. Fly up and down, a crisis, walk out, coming back in again, near rebellion from the security forces, and finally the new constitution.

On February 14, 1995, our new President, Nelson Mandela stood in a room half this size. Eleven of us were sitting on the bench, in our robes, ready to swear our fidelity to the new constitution, when he rose to his feet and said, "The last time I stood up in court was to find out if I was going to be hanged. Today I stand up to inaugurate South Africa's first Constitutional Court." To show our gratitude, eight months later we struck down two proclamations of Nelson Mandela. We nearly undermined the whole process of introducing democratic local government for the first time into South Africa. If that was not enough, in October 1996, the Constitutional Court declared South Africa's Constitution un-

constitutional. How does that come about, and what has that got to do with minorities and majorities which is the basic theme of the discussion today?

When we reached the stage of moving from talks about talks to actual talks, one block of the participants in the negotiations declared that we needed to draft our new constitution now. Constitutions are about protecting minorities and individuals from majority rule. This group claimed that unless we draft the constitution now, what guarantees the Whites of South Africa or others who believe they would not win elections have? What guarantees we have that in the future we would not be persecuted in the same way that perhaps, we had persecuted others in the past? This argument was based, not on some kind of fundamental morality or justice, but on simple pragmatism. In fact, the worse the behavior in the past, the greater the justification for having a constitution now. There will be a natural desire for revenge from the majority and unless we entrench certain mechanisms, institutions and principles that will prevent abuses in the future, we are simply handing over our rights. We will be handing over our future and the futures of our children and grandchildren to an uncontrolled majority and we will be defenseless.

The second major group at the negotiations disagreed. They believed that if we, who are self-appointed, who have no mandate, who have no democratic authority whatsoever to draft a constitution, simply sit around a table and draft the constitution ourselves, we are simply carrying on in the tradition of colonial and racist domination of a few people making decisions about the destinies of the majority. This is true, even if we put it to a referendum. If such a document can be made around a table by negotiations, it can be unmade in the same easy way. It will have no deep historic authority. It will not be rooted in the will and wishes and desires for participation and defense of the majority of South Africans. One group demanded a constitution now, while the second demanded we wait. With the juxtaposition of these two groups, it seemed that we would not be able to have a new constitution.

The first group contended that constitutions by their very nature are anti-majoritarian. They exist to protect certain fundamental values, certain core principles, certain mechanisms of process and procedure, for all. They ensure that a mere fifty percent



which has won in the legislative body cannot dominate the whole country and deny the rights to the other forty-nine percent, or even prevent a future change in who the majority will be. The second group insisted that the new constitutional order required the imprimatur, the expressed will of the majority of South Africans, who had been disenfranchised and treated as invisible for centuries. Without that, they claimed we could not have a legitimate constitution. How did we resolve that apparently irreconcilable dilemma?

The answer was to have a constitution to get a constitution. Basically, we set down in advance a certain set of principles, agreed upon by everybody around the table, which would be binding on the constitution-making body, but the constitution-making body would be elected by the whole South African nation. One person, one vote. Nonracial. For the first time in South Africa we respected the dignity and the worth of each South African person. We, as a single undivided country, do this for the first time. An advance guarantee of certain basic principles, themes, and concepts would be enshrined in the new constitutional order, so that the minorities and oppressed individuals could not be abused, and the majority would no longer be oppressed. That was the way this two-stage, constitution-making process, enabled us to move forward.

The next question was, who was to decide whether or not the new democratically elected parliament—which chose the President, Nelson Mandela, which adopted laws through ordinary processes, who was bound by an interim bill of rights, and who had two years to adopt the new constitution—actually did comply with those principles? The Constitutional Court, a body which emerged from the negotiation process, emerged from the political process, structured in the interim constitutional order with a view to continuing to the new constitutional order, but standing apart from the political bodies, from the executors, from the majority party, and the minority party.

I do not think it is an exaggeration to say that in a very quick time we have become a major institution in South African public life. It is not simply because we are clever, and many of my colleagues are brilliant and experienced, or that we have all been through a hard human rights mill of many decades. It is because

South Africa is such a divided society. There has been so much institutionalized pluralism coupled with inequality, so much identification in terms of race, physical appearance, origin, to a less extent religion, and to a large extent language. These factors have been the major determinants of a person's life, destiny, and chances in South African society. Because of the intense variety of different and conflicting backgrounds, to have a governing body established by a compact, is seen as representing the enduring values that look to everybody in society without fear, favor, or prejudice. Such a body plays an extremely stabilizing role in our society.

When I was in Belfast in late 1996, I argued strongly in favor of a similar type of governing body for Northern Ireland. I argued for a body which takes an extremely destructive political conflict and intense mobilization, and converts it into principled forms of debate and argument in terms of internationally accepted legal traditions and values. These principled forms are seen to protect everybody in society, hold together societies in transition, or prevent the conflicts that are necessary and inevitable in any human situation from becoming too destructive. It certainly, I think, played that role in our country.

Now what were the specific mechanisms that we used to deal with the question of protecting minorities in South Africa? First, we have to understand what is meant by a minority. You can have a numerical minority which in fact behaves like a majority. You can have a sociological minority that in fact numerically exceeds those who control the lever of power in society. That was our situation. Many of the arguments in favor of minority rights appeared to support apartheid in South Africa, and appeared to give some kind of legitimization and justification to White minority rule. In our country the minority was the majority, the majority was the minority.

*By law* the Whites owned eighty-seven percent of the surface area of South Africa and in practice controlled ninety-five percent of productive capital. The Black people were expelled from the best land and kept contained in thirteen percent of the surface area. The languages spoken by the White people, English and Afrikaans, were the official languages of the entire country. The African languages had only small areas of local official recognition.

*By law* the Whites occupied the central business districts and

lived in all the plush suburbs. The Black people lived on the margins of the cities. Their personalities, their culture, their wishes were not taken into account, but were frequently, totally and expressly disregarded. It was the majority population, treated like a minority, for whom the claims of international human rights protection were the strongest, and it was the minority, now asserting the right of minority protection, who were behaving as a dominant majority.

Our dilemma in South Africa was how to have a new constitutional order that would ensure that people who had been treated as non citizens—who had been denied their most fundamental rights: housing, health, education, their languages, their ability to move freely and to live together in family life—how would they get their rights in the land of their birth as human beings and citizens?

At the same time, however, we wanted to ensure that new forms of oppression and domination did not replace the old. We were absolutely insistent on one person, one vote, a non racial franchise. It took a long, long time for that to be accepted. Until then, the argument from the other side was to constitutionalize minority protection in the political system. It would have been a disaster for the Whites. It would have made them a permanently beleaguered minority, relying on constitutional protections to try and hang on to their privileges. Not only would it have been unfair and unjust to Black people, it would have been a disaster for Whites. It would have said those of us who are white are not part and parcel of South African society. It would have said there is not a mutual interdependence between all of us. It would have said that there is not a common humanity under our skins which necessitates a common citizenship expressing itself in political terms in an exactly undifferentiated equal way. It would have ensured that any challenges to White hegemony and domination would have, if they were met with constitutional protections, become challenges to the constitution itself—the constitution itself would have become a battleground. Instead of the constitution being the banner of peace, the constitution itself would have been a war zone. The experience in Cyprus, where they attempted to have the prime minister from one party and the deputy from the other party, proved that. They tried the same in Lebanon and it did not work. If people are not willing to work together, share the

country, and acknowledge common citizenship, there is no constitutional device that will force them to do so. On the contrary, forcing it upon them makes the constitution itself controversial. People may be willing not out of desire, but out of necessity. In our case, it was only because the situation was so bad and so terrible that we triumphed. There was just no other way. The alternative was a civil war, mutual ruin—we had to work together. Once we made the initial leap, the rest became a question of finding the appropriate mechanisms and devices, used by humanity in all sorts of situations, to ensure against oppression.

We had many arguments about a bill of rights serving as a curb on majority rule. That was a dangerous argument because it would have made a bill of rights appear to be a “Bill of Whites.” The bill of rights would be transformed into a document created merely to preserve the privileges, the power, and the positions of the Whites. We had to refuse. Everybody must see themselves reflected in the bill of rights—the rich and the poor. A bill of rights can be an enormously transformative document in a society where there is manifest denial of equal protection. A bill of rights enables those who are marginalized, dispossessed, and excluded to claim under simple old-fashioned, even conservative principles, great changes in their lives and to make great demands for improvement of their life chances.

I advanced the argument that in the years of our struggle when we said the people shall govern, we meant the people shall govern, not the people shall oppress. The people do not have the right to use force in any old way. Governing people means regulating, organizing society, creating institutions, and providing the needs and necessities to enable people to get on with their lives. Governing people does not mean oppressing people. When I vote for my member of Parliament or Congress, I give that person a mandate, not to do anything he or she wishes, but a mandate to govern on my behalf—even if my candidate loses. By participating in the electoral process, I acknowledge that I accept those rules of the game.

I am not interested in having those governing interfere with my intimate things—that is not part of the mandate I am giving to the people in government. South Africans of all backgrounds understand these limits, especially those who suffered gross discrimi-

nation and humiliation in the past. They understand so easily, that the police should never again be allowed to burst into homes at night to look at the skin color of people kissing to see if they are violating the law against inter-racial sex. These deep intimate things, which were intruded upon by the previous state, are things easily understood, not only by a wealthy middle class, but understood also by the poorest of the poor, because they are the ones who suffered most from the intrusions of the state in the past.

In the end, we proposed a series of classically accepted constitutional mechanisms, none of which are what we call—mickey mouse—and none of which appear to be devices to prevent the Black majority for the first time living as free and equal people in their own country.

We created a written rigid constitution that could only be changed by a two-thirds majority. This was the foundation of the whole new constitutional order guaranteeing rights for majorities, individuals, and minorities. Secondly, we included a fairly extensive bill of rights, far more ample than the U.S. Bill of Rights. We spelled out many implicit features of the U.S. Bill of Rights that were developed over the years in the United States by means of doctrinal jurisprudential development. For example, we spelled out in express terms a right to dignity and a right to privacy. We included strong children's rights, articulated environmental rights, and in the final version we even have fairly strong—what we regard as appropriate—social and economic rights. Without especially mentioning race, color, language, the devolution of power to regions with elected regional governments in the provinces gives considerable scope to the cultural factor in our country.

In the Western Cape where I live in Cape Town, the majority of people speak Afrikaans. It has a certain history, a certain character. It is where the slave populations were settled and where Afrikaans originally developed as a creole form of Dutch. Its users today, white and black, think of themselves in a particular way. It is part of the South African nation, but it also has certain particularities. Our new freedom allows us to choose our own language for the regional assembly—in fact we have opted for English, Afrikaans, and Xhosa.

In Kwazulu-Natal, eighty-five percent of the people speak Zulu. This region also has a pungent powerful history of certain

traditions that are very significant. The Kwazulu-Natal legislature can, in appropriate ways, have the King of the Zulus as a monarch for the province. The Zulu language can be used extensively, and in other ways. Possibly a particular role for traditional leaders can be established that also takes into account cultural factors. All of this, however, is done in terms of national constitutional principles.

Thirdly, proportional representation, something virtually unknown in the United States. Proportional representation allows groups politically to constitute themselves the way they wish. If they want to have an Afrikaner party they can, but they participate directly in the electoral game, not through a reserved block of seats. Maybe some of the problems you have in this country with districting would be overcome if you had forms of proportional representation. It would ensure that all the different groups would be represented in the parliamentary institutions and through the political process. This they could do either through their parties being identified with particular groups, or through the parties themselves having internal balances of candidates that represent the variety of their members.

Fourth, our constitution expressly gives extensive space to civil society. Your constitution does not do that expressly. Your constitution is based on placing limits on government power in relation to individuals. Our constitution, however, deals with much more than that—it is holding the ring. In modern societies it is not just the state and the individual that count, there are all sorts of interest groups, trade unions, religious groups, wacky groups, intelligent groups, groups that are intensely private, and groups that impinge upon public life. The role of the state as we in South Africa have articulated it, is to hold the ring between the competing groups. The function of our court will be to balance the competing claims of fundamental rights between the different groups and to reconcile the competing principles with each other. Our function will not be simply to work out the balance between the state and individuals. In civil society, freedom of association is given great recognition.

Expressly recognized in our Constitution are language, cultural, and religious rights. Again we avoid the hard polarization that seems to apply in the United States, and the intense conflicts over questions like school prayer, and so on. We did, however,

have quite an extensive debate over the preamble. The initial preamble said, "In humble submission to Almighty God." That phrase, however, was dropped from the final text and now we simply have, "*Nkosi sikelel Afrika*" which translates as, "God bless Africa." In view of our history, this is a phrase believers and non-believers alike can support. It is the beginning of a hymn. It was a hymn of a struggle, a yearning for. We used to sing it in fact, with the most secular of all signs. You could hardly be more secular than singing the religious hymn, "God bless Africa" with a clenched fist! Somehow it was an appropriate way of reconciling the believers of different faiths and the nonbelievers.

At the negotiations, we opened with prayer from Jews, Hindus, Muslims, as well as from Christians. This caused great discomfort to one leading politician because he was seen on television with his eyes closed during the Muslim prayers. Some of his more ardent Christian followers felt that this was bowing before the infidel. Afterwards, in fact he was absent.

Finally, however, the one reason we pushed for this phrase, was that it has a cultural resonance as well. The Muslims and Hindus are people mainly of Asian origin. In many ways, they were subordinated in religious terms to Christianity, for example their marriages were not recognized. This phrase was an assertion of a new reign by South Africa. Now, we have silent prayers where people—believers and nonbelievers alike—can meditate in a way that is not regarded as oppressive to anybody and respects the conscience of all.

We also have a particular mechanism in our new constitution, regarding language rights, called the Pan-South African Language Board. It is a commission set up to deal with protecting language rights. It has a multilingual approach you do not fight for, without the bitter contest as appears to be here sometimes between English and Spanish. The Board is there to create language harmony, to enable us to enjoy the richness and diversity of the different languages, and to encourage respect for other languages rather than to attempt to get one language to triumph over another.

We also have commissions dealing with cultural communities. These, however, have not really gotten off the ground and are likely to be controversial, but they do have a constitutional foundation.

Additionally, we also have special provisions dealing with the role of traditional leaders. It is a complex, intricate area in the context of a democratic, non-racial, and gender equality-based constitution. Recognizing traditional leaders raises a whole number of very difficult questions, which we will have to deal with on a step by step basis.

Finally, special provision was made to bring in those Afrikaners, generally referred to as conservative or right-wing, who felt that living under Black rule was so antagonistic and threatening to their culture and way of life that they wanted what they called, self-determination in a volkstaat. The Constitution allows the possibility of self-determination for a group like the Afrikaners, provided there is substantial support. Mandela is reported to have said to that group, "You don't have to fight us. We are not against self-determination in principle, but you have to show us what part of the territory you want and what happens to non-Afrikaners in that territory." Now the issue goes to the intellectuals on that side, who no longer feel they are fighting to establish a principle, but to show its practicality. Many people gradually became used to having Nelson Mandela as President and even came to like it and the idea of having such a universally admired president.

Well, that is where the Constitutional Court has a special role to play in divided societies. The Court defends these core principles and values, ensuring that everything functions cleanly, that appropriate balances are struck, and that the promise made by the constitution will be fulfilled—whether it's a promise in terms of how government will function and power will be expressed or whether it's a promise in terms of the basic values and fundamental rights of our new society.

I just want to say that it has been intellectually and emotionally thrilling work. I cannot think of anything more satisfying for any lawyer anywhere in the world. For so long our country was the apotheosis of law expressing itself in a cruel and evil way. Apartheid was enforced through law. Our judges sentenced more people to death than almost anywhere else in the world. Everything, the division of people, the denial of rights, was done through law. It is extremely heartwarming and encouraging to see that law can fulfill its vision of giving security to people, and of helping to guarantee dignity. I feel privileged to be part of the generation



that is accomplishing that. Thank you.

## V. QUESTIONS

PROFESSOR MANHEIM: Listening to our three esteemed panelists, particularly Judge Sachs's description of the elaborate structure for South Africa's new constitution and the promises it holds for the future, I for one, believe that Fukuyama was wrong. We are nowhere near the end of history. We have at least a few more years to go.

I would like to invite questions of our panelists, and if you have a question please step to the microphone, lineup behind the person in front of you; and if you would, direct your questions to a particular panelist if that's appropriate.

QUESTION FROM AUDIENCE MEMBER: *Judge Sachs, how has South Africa handled the question of property distribution? Is the current system locked in? Is there compensation if property is changed over, and how close did property issues come to scuttling constitutional debate?*

JUDGE SACHS: We thought property would scuttle the negotiations. We thought the army would scuttle the negotiations. We thought that education would scuttle the negotiations. We thought religion would scuttle negotiations. This is just one of a whole series of intensely difficult areas. In fact, right now, the property question is not one of the most contentious ones. The amnesty question is burning. It is very painful and it is very difficult. I think it is because so much attention was given to property before the negotiations and during that period. We ended up with a double strategy. The Constitution recognizes that people who were evicted from property on the basis of race statutes from 1913, up to the date of the new Constitution, today have a right to get their property back if it is feasible, otherwise appropriate repatriation. A land claims commission and court have been established to receive requests of that kind and to investigate the feasibility.

What happens to the new owners, the present owners? They are entitled to compensation according to a formula that's not ex-

actly market value involving a willing seller and a willing buyer. The formula takes into account the history of the acquisition of the property, profits that might have been made, investment that could have been put in, as well as market value. The government, however, has been trying to avoid any form of massive wholesale expropriation, as well as trying to use market-assisted methods to ease the process of transition through the use of revolving funds.

These provisions relate to giving people who have been removed from what are declared White areas, back their land. That, however, would only apply to a relatively small area. The wholesale evictions took place in the last century before this period, ending up with the Whites owning eighty-seven percent of the land. That has to be dealt with by land reform, a very different process. Here the government is trying through acquisition to redistribute thirty percent of that land in the next five years. One of the problems is the queue, the line-up of who would be entitled to the land. Do you go for the very, very poor, the people most desperate and landless but who aren't necessarily the people who can best use the land? Or, do you go for the people who have got the tractors and some know-how but who are not as desperate? I guess the answer will be a mix of the two, but I think the government will say that sometimes less is more. It is better to start with some pilot schemes. You train the people, you make sure they have the seed, the transport, the finance, and that it works. Eventually, African family farming becomes a prototype of a major new form of agriculture in South Africa. In addition, there is a vast amount of under-utilized land owned by Whites. Maybe a land tax will be instituted, so that it pays to sell some of the land rather than keep it idle and pay the tax. Measures of that kind could be employed.

We do have a land claims court. To control the process, we decided to use judicial controls rather than administrative controls to prevent nepotism and corruption. It is just too easy—when the land reform is done through purely administrative means—for the government to end up taking land from one elite group and giving it to another elite group, and ordinary landless poor don't benefit. The law aims at judicial control, but judicial control in a way that is promotive of land reform. Not in a way that would frustrate the reform, with cases locked up for five, ten, twenty years with all sorts of technicalities preventing redistribution.

QUESTION FROM PROFESSOR SETO: *This is a question for each of the panelists. It sort of an end of history question, actually. One of the tensions in constitutional development has been a conflict between "Thou shall not" constitutions, which say to the government, "You can't do this, you can't do that," but leaves everything else to the individual, and "Thou shall" constitutions. Perhaps the Soviet constitution is a prototype of that word. There are affirmative rights to various sorts of economic and social institutions.*

*One possibility is that we have reached a resolution. To say the typically Western notion that it is not practicable, not justiciable to have "Thou shall" that is to have affirmative rights.*

*How is that played out in each of your respective constitutions? To what extent is there, do you believe, a role for affirmative rights and how can those be effectively justiciable as opposed to the others?*

ATTORNEY GENERAL DERMOT GLEESON: Well, the question you pose is largely a matter of taste and political ideology. There are a range of political systems starting with the Soviet Union and working back towards one where you have minimal government. So it is to some extent a political scientist question, rather than a legal question.

In the Irish situation, most of the constitutional rights are "Thou shall not" rights. The number of truly affirmative rights are few and far between. There is for instance, a right to free primary education. Every child is entitled to go to school which has been used to prevent the teaching unions closing down schools as well as rendering unlawful certain strike actions at times.

Speaking in my capacity as Attorney General; my instinct is for minimal government. The more affirmative rights you have, the more headaches from a purely day-to-day point of view. It is a question of whether you believe the government can orchestrate large areas of people's lives. I think there are a small number of important rights which every state should protect and a small number of affirmative rights where government should intervene. But the proliferation of the second class, in my view, involves an ideological view which is not to my taste, namely, that government knows best in all sorts of questions. I appreciate that's part of a larger political debate in this great democracy as well.

JUSTICE LIU: As far as Hong Kong is concerned, we have the Basic Law, which has been described as Hong Kong's mini-constitution. Like the Indian counterpart there are provisions for every possible type of legislation, for every conceivable type of actions, inactions, prohibitions, or allowances. The main purpose of the Basic Law is to entrench the existing rights. No one has, so far, criticized the Basic Law as such. It may well be it is unwise for either side to

After all, the Basic Law was formulated as an instrument between two nations and with only subsequent consultation amongst the Hong Kong people. I agree, at any change of constitutional scenario, it would be desirable to have rights clearly defined and freedoms clearly outlined and protected.

The Hong Kong Basic Law, aims at crystallizing the existing rights. Most of our debates, even before the operation of the Basic Law, focus on the meaning of "existing" rights. One party maintains that existing rights should be those in existence in 1984, when the declaration was signed by the two sovereign powers. In addition to what were expected to be the normal progress from 1984 to 1997. The other party had a quite different idea, they saw in the Basic Law a free license for introducing reformative measures. Therefore, as far as the Basic Law was concerned, they did not see any clear definition of existing rights. That was our problem even before implementation of the Basic Law.

The Basic Law was negotiated and agreed upon within a very short time frame and therefore, it may well be forgivable that the sovereign powers only agreed to the basic essentials. There is little guidance for the best consolidation of the needs of any given people at a time of constitutional change. As far as Hong Kong is concerned, we have done the best we could. We are hopeful that the provisions in the Basic Law could be put into operation after 1997 without too many problems and with good will on the part of everybody, I look forward to seeing it smoothly implemented.

JUSTICE SACHS: The question you raised was fiercely debated over many years in our country. I think I am not over-simplifying when I say that by and large those people who had homes, access to education, to health services, who could travel freely felt: "What the hell has the government got to do with any of those

things?" They were concerned to keep government out because they were doing very well. Those people who lived in circumstances where their kids could not go to school, where they watched their children die of measles, where they didn't have electricity or water felt: "Well, what does freedom mean if we don't have access to these things?"

We will never be truly equal in any meaningful way if we do not attend to these survival questions and we cannot do it by ourselves. We work so hard just to put up our shelters. We tramp up and down looking for work. We do everything we can. It is not a lack of effort and sweat on our part, however much we try, we have just been so systematically excluded in the past that we have become inferior citizens, seemingly invisible, with the vote, freedom of speech and not much else.

As for the latter group, who constituted the majority of South Africans, the social and economic questions were dignity questions as well. We are suffering in this way because we are Black. You could not separate the two—any system of equal protection had to acknowledge a very close interrelationship between personal dignity, your background, and the past oppression. Therefore, in that sense there was a strong insistence on social and economic rights being included.

They were not too powerful in the interim constitution. There were strong rights to education and the children's rights included social and economic rights for children. An environmental right is kind of a third generation right. It is not just an individual right against government intrusion, but a right that you can really only exercise in a collective. The final constitution, however, has more express terms dealing with social and economic rights.

It is argued that these rights in the Constitution would undermine your first generation rights, your fundamental rights and freedoms. The counter-argument was that far from undermining them, it would be seen as part and parcel of a package, giving them more meaning and acceptance. The way I used to express it in my writings was: we don't want freedom without bread; we don't want bread without freedom; we want freedom and bread. I do not see the two as being necessarily inherently in contradiction with each other.

The problems of justiciability are great. It is relatively easy to

use these certain economic rights in a negative sense to prevent the destruction of health services, educational services, and so on. They can play a powerful role in getting the balance right, in interpretive terms, and in weighing government action to understand whether or not it is legitimate. It gives a quality, a character and a pungency to the constitution. It can be very, very important in deciding borderline cases one way or the other. What is important is not to allow the claim for social and economic rights to deny the freedom rights. I personally feel very strongly about that.

In the end, the rights to conscience are more powerful, stronger, and more meaningful than even the rights to have a full stomach or shelter over your head. If you can speak and argue and articulate what you want, you find the best ways of achieving the other things, but if all you can do is eat as much as you like, you may just end up obese and not a free person enjoying being on this earth.

It is a nonstop kind of a debate, but in strengthening the socioeconomic rights positions, we looked to the Universal Declaration of Human Rights, the International Covenant on Social, Economic, and Cultural Rights adopted and overwhelmingly supported in the 1960s by the United Nations, and the African Charter of Rights. Many international instruments do recognize social and economic rights. They are programatic rights. The problem is to ensure that the programatic rights are not a substitute for restrictions on abuse of power by the state, nor simply pie in the sky. People understand that it is basically for the legislature and the executive to ensure the programatic rights are achieved and not for the courts to be immersed in those things. I don't think it is too fearsome a kind of a thing. You can see which side I tend to lean on.

QUESTION FROM AUDIENCE MEMBER, TO IRISH ATTORNEY GENERAL: *From your personal experience do you think that articles II and III of the Constitution are a political distraction or an actual impediment to a better understanding between the peoples of the six counties of Northern Ireland and the Irish Republic?*

ATTORNEY GENERAL DERMOT GLEESON: To those whom this question does not seem very clear, it is a question about an

apparent territorial claim in the Irish Constitution over Northern Ireland. It has variously being categorized by different judges as a legal imperative or simply a political objective.

My own view is that is it a piece of the constitutional jig-saw, which in the longer term requires revision, whatever its character. I think constitutions are better if they confine themselves to justiciable matters, certainly in controversial areas. I think the making of controversial political statements in constitutions is inappropriate. Echoing something Judge Sachs said, that in a sense the constitution becomes the "battleground" I think were your words. Because this is something that is hotly disputed by persons in Northern Ireland, the Irish Constitution becomes a battleground, and I think taking a leaf from your book, it would be better if the constitution was seen by all possible adherents as a document around which they could congregate rather than one which they have to fight about. I hope that is some sort of an answer.

PROFESSOR MANHEIM: I want to thank, as I have great and deep respect for all the panelists that shared their insights with us today. I would also like to thank Dean McLaughlin and President O'Malley for putting together a marvelous Charter Day program. I want to thank all of you as well for attending. I think one thing at least that I will take away from today's program is a deepened respect for the institutional protection of human rights, particularly by independent judicial bodies. And I think it validates perhaps the wisdom of the inscription over the edifice at Langdell Hall at Harvard Law School "*Non sub homine, sed sub Deo et lege.*" "Not under man but under God and law."

Thank you very much for attending.