



INNOVATIONS FOR SUCCESSFUL SOCIETIES

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SCHER: My name is Daniel Scher and I'm the Associate Director of the Innovations for Successful Societies project and I'm here at Parliament in Cape Town with Dr. Oriani-Ambrosini. Before I begin I was wondering if you would mind just briefly introducing yourself.

AMBROSINI: *Yes, Mario Gaspare Oriani-Ambrosini. I am an Italian-born, U.S. lawyer trained at Georgetown University Law Center. I was part of what was then the Philadelphia Constitution Foundation and Human Rights Advocates International, headed by Professor Albert Blaustein. We were international constitutional consultants acting as lawyers to clients involved in negotiating, drafting, and formulating constitutions, whether they were leaders, political parties, or government. We did the first draft for the (Boris) Yeltsin Commission in Russia, worked in Poland, Macedonia, Romania, the Seychelles and Namibia, and so on.*

Within that scope of work, starting from 1989, we began, amongst many other people in Washington D.C., working on what was then the South African dilemma—looking at the institutional and constitutional solutions and techniques that could accommodate the conflicting needs and aspirations which emerged during that long process. I got involved at the beginning of 1990. I met (Prince Mangosuthu) Buthelezi for the first time in June, 1991. I was sitting behind him in the U.N. Security Council meeting called by Nelson Mandela after the Boipatong massacre. However, my older partner and mentor, Albert Blaustein, had been involved with him since the time of the KwaZulu-Natal Indaba. It was a long-term association. I was with the IFP (Inkatha Freedom Party) at the opening of CODESA (Convention for a Democratic South Africa) in December 1991. I drafted for the IFP all the constitutional submissions made at CODESA since that time. I went back to South Africa in October, in March, then again in July 1992.

From November 1992, I was working full time for the Inkatha Freedom Party and the erstwhile KwaZulu government in the negotiation process for the constitution. I was involved in each and every stage, both in the formal negotiation process as well as the informal negotiation process, reporting directly to Prince Mangosuthu Buthelezi. Thereafter, I became the Advisor to Buthelezi in a ministerial capacity when he became the Minister of Home Affairs in April, 2004 in Mandela's Government of National Unity. The position of advisor is an unusual one. It is a handpicked person appointed on a political basis in terms of Section 12A of the Civil Service Act and is interposed in between the Minister and the Director General. The position is within the ministry, strictly speaking, rather than the department. I maintained that position for the ten years during which Buthelezi was Minister of Home Affairs. I was in charge of reformulating the South African immigration system and the various pieces of legislation within the department, the marriage laws, the different publication control laws and all the others we did over ten years.

Within that context, I was an advisor also to the leader of the minority political party in the Government of National Unity. Therefore my scope of work related to anything going through cabinet for ten years, dealing with each aspect of cabinet as well as the formulation of the second Constitution, which was produced by the Constitutional Assembly. My principal was the leader of a political party which headed the government in the Province of KwaZulu-Natal. So I also acted as advisor in that capacity being heavily involved in the drafting of the provincial constitution of KwaZulu-Natal of 1995. It was a provincial constitution. Beside my heavy involvement in all constitutional and legislative matters of that province, I had little else to do when Frank Mdalose and Ben Ngubane were premiers, but I

became more actively involved in the actual governance of the province when Lionel Mtshali was the premier, and was often referred to by him as one of his extra advisors. It was a collective effort to provide the province the best form of governance we were capable of.

Then in 2004 I retired from politics for five years. In 2009 I was put back into the list of the IFP and I am now a Member of Parliament in the Inkatha Freedom Party, serving on the parliamentary committees on Justice, Finance, Rules, Constitutional Review, Economic Development, Trade and Industry, and Public Enterprises.

SCHER: You have had a long career here and you've been involved with many things, but today I'd like to focus on your role during the negotiation process. To start out, I just have a general question. When you were brought in to advise Prince Buthelezi and Inkatha, what did you perceive as being the major challenges facing Inkatha and where you could make the most necessary contribution?

AMBROSINI: *See, I did not have a political brief; I had an institutional brief. Quite frankly, Prince Mangosuthu Buthelezi and the IFP gave me quite a lot of a free hand in formulating that brief. If I were to summarize it, my brief was merely that of creating the best constitution we could for the country. The approach was: "let's set the agenda for what should be done, and let's confront the ANC for doing anything less than what we think ought to be done."*

So what was then an existing confrontation between the IFP and the ANC on a variety of political levels—not least the level of physical confrontation in communities through violence—was lifted up on to the different level of institutional debate, which still enabled the flexing of political muscles in terms of the one party wanting one thing, and the other opposing it. But it would, nonetheless, create a rational framework, from which—at the end—the country would benefit and it would be violence-free, which was my personal objective and the objective which I understood Buthelezi allowed me to pursue. So our agenda was to create the best constitution we could and defend it with a certain measure of rigidity so as to accommodate the intransigent politics of the time. It became rigidity on constitutional issues rather than violence, with the same effect on the respective constituencies but without spiraling bloodshed.

The ANC approached the negotiation process armed with very few constitutional tools. Their main two tools basically were the Freedom Charter that, if you read it, was a simple document about wanting democracy, human rights, and equality for all in South Africa. It didn't go into the form of state—whether it should be unitary or federal. It didn't go into whether there should be a constitutional court, a strong constitution, et cetera. The second thing with which they approached negotiations was complementary to the first one, and was their wanting a constitutional assembly. So their call was not to have any decisions made, or discussions held on the substantive aspects of the constitution because that would preempt that which a constitutional assembly could decide.

The ANC's entire negotiating position throughout what was known as CODESA1—as opposed to CODESA2 and the multiparty negotiation forum—was an election for a straight run to a constitutional assembly. On the other hand, as you well know, the position of the National Party was to ensure constitutional continuity which meant a democratic constitution in place before elections and an election held in terms thereof. The National Party had approached Buthelezi long before F.W. de Klerk's epoch-making speech of February 2, 1990, which announced the

dismantling of apartheid and the release of Mandela. The approach to Buthelezi was exactly that of trying to negotiate with him bilaterally, a constitution in terms of which political prisoners would be released, the banned political parties unbanned, and a general election with universal franchise held. This fact has been acknowledged many times. Lately, two days ago by the President during the State of the Nation address, by the Chief Whip of the majority party doing his address and by F.W. de Klerk during the celebration of the 20th anniversary of his speech on the 2nd of February.

Buthelezi refused to negotiate a constitution bilaterally with the National Party, and demanded that, before any negotiations, any discussion on the merits of the constitution could begin, the ANC had to be unbanned, that prisoners be released and Mandela able to participate in it. In so doing, he effectively relinquished the possibility of becoming the liberator of South Africa, the man through which the liberation was achieved.

The important thing for the purpose of our discussion is that the National Party maintained this mindset: constitution first, elections afterward. The ANC's position was election first, then a constitution through the constitutional assembly. The National Party's position was just the opposite. That gap was breached after the Boipatong massacre in May 1992. At the resumption of negotiations, the Record of Understanding was entered into in September 2002, between the National Party and the ANC, in terms of which a two-stage process would be designed so that there would be an interim constitution that would enable an election to be held pursuant to that constitution. Then after the election was held and the various parties' political supports tested through that election, a constitutional assembly would be empowered to write a final constitution.

One of the concerns of the National Party was how could we have a constitutional assembly without an election when a variety of parties, Inkatha, the ANC, the PAC (Pan Africanist Congress, the ACDP (African Christian Democratic Party), et cetera, et cetera, were all claiming to be representative of the population, claims which could not be tested through an election.

So this was the initial juxtaposition, the beginning of the real negotiation. Our agenda, my personal agenda, was to create a system of government with the strongest measure of checks and balances. You need to push back the clock and understand the mindset of the time—our specific mindset, my mindset, Buthelezi's mindset. We were all children of the Cold War. For years we tried to prevent a communist takeover of southern Africa. Behind the ANC, there were the Soviets. When the Berlin Wall fell, all became possible and de Klerk could do what he did. The fall of the Wall was the critical element as he said in his speech on the 20th anniversary of his famous address to Parliament. He said that the fall of the Wall was the critical element, which enabled foreign powers to pull the plug on the support they had given, rightly or wrongly, to the apartheid regime.

A communist takeover of southern Africa would have made Vietnam look like a picnic. South Africa was the center of a Soviet geo-political maneuver. There was Soviet influence in Mozambique where there was civil war. There was Soviet influence through the Cubans in Angola where there was civil war. There was Soviet influence in Namibia. The fall of South Africa to Soviet influence would have affected US interests at their vital core. At the time, there were no satellites. There were submarine-detecting facilities in South Africa. Sixteen strategic minerals were coming out of South Africa. The Soviets had to be kept out at all costs.

So this was the mindset. Even though the Soviets were no longer behind the ANC, nonetheless the concern was that that ANC power might not have been necessarily power for good. Because of this, the ANC power which had to be limited. There are also considerations of the constitutional philosophy to which each of us subscribes. Personally I am somebody who shaped his thinking with the Federalist Papers. I think that government is evil. It is a necessary evil, but an evil nonetheless. I believe in strong checks and balances. My politics are the politics of Ron Paul. I believe in limited government. I am a libertarian. So we are all children of our ideological sins. That was the mindset at the time from within our quarters and the agenda that I pursued.

On the other hand the ANC saw itself as a righteous, if not self-righteous, movement that could do no wrong. So its intention was to have as much power as possible, because they were going to do right, and their power had not to be limited, because it was a power backed by constitutional mandate. So by limiting their power, by limiting the will of the people, it would have limited the capacity of their government to perform. It echoed in all respects, what Jean-Jacques Rousseau would have said, and did say, in formulating his theory of the general will of the people.

In practical terms, that meant the ANC originally did not want to have a Bill of Rights because said: "we are democrats, how can we possibly violate a human rights?". They abandoned that position very quickly through several interventions. Somebody like Princeton Lyman, who was the US ambassador at the time, knocked some sense into the ANC' negotiators' heads.

The other ANC position was about wanting a strong unitary state. There was a sense in the ANC, which to a certain extent still exists, that the stronger the center, the more centralized the state is, the more power one has to do what needs to be done. There was common cause that there was a hell of a lot which had to be done: transformation of the economy, transformation of social injustice, transformation of everything. Our approach has never been about questioning what had to be done, but rather how to do it. We were aware of what experience throughout has shown throughout Africa: you get everything centralized, and then the center collapses and there is nothing left. So building the institutional capacity required decentralization in the form of local autonomies. You need to get people to apply their mind to problems and be accountable.

Within our options was a federalist model in which there would be different centers of power --indestructible provinces within an indestructible union, to paraphrase an American slogan-- which would keep the central power in checks and balances, but also would increase the overall capacity of the institutional machinery so that there would be an overall capacity to bring about the type of social, economical, political transformation which we all agreed had to be brought about. Our next issue was what type of federalism? What type of decentralization and when? The "what" and the "when" became the two key aspects of this negotiation.

The ANC accepted the need that something had to be decentralized, but it, itself, never went through the process of formulating what it was that it wanted. The ANC fought back the notion of decentralization as much as it could while preparing itself to accept as its own proposal all that which it would finally be convinced or forced to accept. This ambiguity was reflected in the fact that, throughout the negotiation process, basically until September 2003, there was no

denotation of what it was that the ANC wanted. The decentralized organs were referred to as "SPR", meaning state, provinces or regions, because the issue of their nature, which was the issue of their degree of autonomy was not going to be openly touched. The notion was that of putting together what SPR were meant to do, and then evaluating what they looked like. We wanted them to be states as in a federal model, and wanted them to be determined as such from the outset. There were a number of additional considerations. From an IFP viewpoint, we were seeking also the recognition of the kingdom of KwaZulu-Natal, of the Zulu nation, as an ethnic and geo-political entity that existed in itself as an historical reality.

This federal notion was formulated against the background of the KwaZulu-Natal Indaba that had already brought together the various components of KwaZulu-Natal. At that time there was a great deal of support for that notion of a strong KwaZulu-Natal federal state within the unity of South Africa, not only from the Zulu components but also from the English-speaking components who saw in Buthelezi a much more known and reliable government or governor than the unknown ANC government still tainted with the fear of communism. So, within KwaZulu-Natal there was a great deal of support for the strong federalist proposition.

But, how do you bring about that in an environment in which constitutional engineering was used not to liberate, but to oppress, and the entire notion of fragmenting of powers utilized by apartheid was somehow discredited? The argument from the ANC side was that we were trying to continue the balkanization of South Africa, the very fragmentation used by apartheid to oppress. The ANC purpose was unite that which apartheid had artificially divided. Yet apartheid did not invent ethnicity or race, it just utilized it for purposes of oppression. But the same could have been utilized for purposes of self-expression and empowerment. Obviously it makes more sense to create entities around people who speak the same language and have the same culture, and give such entities the task of governing themselves within an own overall unifying federal structures. Europe is the typical example. Within Europe, Belgium and France are separate countries and will remain as such even when the United States of Europe are forged.

That's where the debate laid until the constitution was finalized in October 1993, without any provision having been made for state, regions or provinces. Most people often don't realize that a constitution was finalized between the National Party and the ANC by the end of September 1993 and this was what was supposed into force in 1994. There was nothing in this constitution about decentralization: no states, no provinces, no region, except for a Commission on Regionalization that would have prepared a plan on how to regionalize the country and would have given that plan to the constitutional assembly. So the democratic South Africa would have been born as a unitary state and it would have been regionalized by the constitutional assembly, if the constitutional assembly so wished. The National Party and the ANC had agreed to that.

Our problem was that the same party which didn't want it to regionalize before elections, was not going to have a change of heart and endorse the need of regionalizing after election.

The proof of the September 2003 version of interim Constitution having no decentralized entities is in the fact that when the interim constitution was finally adopted by Parliament, this provision on the Commission on Regionalization was

still there even though it had no longer any purpose. Because of our subsequent negotiating efforts the interim constitution established provinces at the same time the election were held and eliminated the power of the constitutional assembly to disestablish them or diminishing their powers. After this the Commission for Regionalization became obsolete and we had to go around for months and months trying to find a purpose for this entity

In fact once the a draft constitution was finalized between the ANC and NP, we opened another channel of negotiations in which we demanded and succeeded in obtaining two fundamental things, provinces, within the interim period, and the constitutional principle which circumscribed the discretion of the constitutional assembly, so that the constitutional assembly could not disestablish those provinces or substantially reduce their powers and functions. That's how the constitution was adopted, together with this Commission on Regionalization which served no purpose whatsoever, because you could no longer decide not to have provinces. Provinces had been entrenched.

If you go back and look at the papers of that Commission, it was completely pleonastic, but the explanation of that is that the formal process between the ANC and the National Party had produced the result. We took the result in the bilateral discussions held incessantly with the National Party and the ANC and we took it further on an additional line of compromise. The difficulty of that process was that it was informal. It was not documented. I have promised myself to write a book about it and I keep delaying. But my papers are available for those who can fill this gap, because that process shaped the form of the South African state and the relationship between the different levels of government. A great deal of work was actually done between myself and (Mohammed) Valli Moosa. The actual powers of provinces came out of a document which I drafted taking the list of South African laws from Butterworths. It went from A to Z literally listing all the subject matters, eliminating those that were obviously not provincial competencies, such as air traffic control, but leaving all the others. I presented that list to the ANC negotiator. That's why you got anomalies like "abattoirs" which remain a provincial competence. I put on the list as much as I could and fought with Valli Moosa to keep as much as he would agree to. He let abattoirs go.

At the other end we fought strenuously. From my American background, I was looking for a provincial power which would possibly encompass all the other powers and had the capacity of expanding beyond what one would immediately envisage, such as the power of interstate commerce in the state which enabled the federal government to expand its powers. I was looking for something similar but at the provincial level. One of the things that I put down as our precondition was the power of consumer protection, which is now a provincial power but which, alas, has never been used. It is still there as something capable of increasing its provincial powers enormously.

Therefore, in respect of the "when", we managed to have provinces during the interim period and entrench them for the period after it. The issue of the "what" is two-fold. It hinges on the list of powers and on the relationship between powers. I told you what powers we managed to succeed to have, but the fundamental issue was that we failed to secure the residual powers for provinces. Our original position was that residual powers should be with provinces. Provinces would be the primary government of the people. Residual powers are all the powers which are not listed. As it is in the U.S., they are the powers of adopting laws on personal matters. It is the entire law, the common law, the commercial laws,

criminal law. Whatever diversification is required residual powers should be at the lower level, on the basis of the principle of subsidiarity, so that one area can be treated differently from another place. But that was a non-negotiable for the ANC. So we lost on the residual power.

The other thing that was quite important for us was the relationship between powers. In this concern of ours we were proven correct. Since the outset, we sued for mutually exclusive powers that, in an African context, I think remain important. Mutually exclusive powers means that while one level of government legislates on one matter, the other legislates on the other matters. Each level has its own competence, as it is in the U.S. If one level can do it, the other can't. This is not a rigid limit, because the national level can always go beyond it by suggesting uniform laws that each state or province adopts in their legislature. Instead, the ANC wanted a system of concurrent power so that each of the two spheres of government has exactly the same amount of legislative power. The can both do the same thing.

Once the concept was entrenched that both levels can adopt the same laws, for months the negotiation moved onto the criteria that determine which level prevails and under what conditions in the case of a conflict. There is a great lesson to be learned because the end result, on all accounts, what was produced in both the interim and the final constitution is very favorable to provincial autonomy. Provinces have a very broad range of powers. Provincial law prevails over national law and that is the rule. The exception is that national law prevails over provincial law only if and when national law falls under one of the overrides which were written in section 126 et sequitur of the interim constitution and are now written in section 146 et sequitur of the present constitution. So there is great provincial power.

But what is happening, in reality, is that the national government has fully covered the field with its national legislation. In each provincial subject matter the national government has adopted the full measure of what one would expect to be legislated in that field. In this context, national legislation has often assigned a role for provincial legislation. In this context, provincial legislation has effectively become secondary or subservient legislation, almost as if it were a regulation, not in law. Even though provinces would have the power of legislating way beyond the space that national legislation crafts for them to legislate in, they have remained constrained to legislate within that space, without challenging the narrowness of that space. So provinces have become an administrative implementer of national government through provincial legislation. Because of the concurrence of powers the erroneous perception exists that national legislation prevails and set the boundaries for provincial legislation, which has forgone most of what we gained during the negotiation process.

This is not a flaw in the constitution per se. In my opinion, the technique of concurrent power in an African context is heavily permeated by an emotional hierarchy. The President is more important than the Premier because he is the President. There is no conception of the fact that people do different jobs, and when they're doing their different jobs they have equal dignity. Everything is conceptualized hierarchically. Therefore there is no challenge from the provincial level and no self empowerment, and there is also a great sense of dependence. "If the national level does it, we don't do it."

Obviously the situation has become worse because of the politics. We have one political party that controls both the national government and most of the

provinces. But even in the province of KwaZulu-Natal and the Western Cape, it was very difficult to develop initiatives that at the legislative level challenged what was done at the national level. We developed a few of them. I engineered a couple of test cases. None of them was ever brought to finality in the constitutional court with the end result, that even though the conflicts between national and provincial legislation would, to any constitutionalist's observation, be the most critical and difficult aspect of the constitution and possibly the most litigious, to this day not a single case of hinging on the application of the overrides has been adjudicated by the constitutional court.

We almost brought one flowing from the conflict between national and provincial legislation dealing the gambling central monitoring system. I engineered that conflict. IT was my final test case because the province of KwaZulu-Natal was doing exactly what the national government was doing, but wanted to do it in its own name and for its own account. But that case couldn't be finalized, because the IFP lost control of the province and one of the first things the ANC government did when it took over was to reverse the situation and settle the case.

SCHER: You've spoken about how the relationship between the provinces and the center has functioned, but could we pull back a little bit to your involvement now? Prince Buthelezi and Inkatha had a history of advocating a federal solution, the Indaba being a central point where this had floated. As somebody who has worked on a number of other cases, did it make sense to you that South Africa should try and pursue a federalist system or federalist route and if so, why?

AMBROSINI: *Obviously yes. My senior partner, Albert Blaustein, was with Buthelezi during the KwaZulu-Natal Indaba so my brief took cognizance of Buthelezi's stance for federalism. Being lawyer to client, you start from what the client wants. I was a servant carrying a brief. But stepping back, the tensions within South Africa would prompt any one applying his mind to the problem to try to create as many checks and balances as possible. That can be done both in terms of different sphere of government, as well as fragmenting government across a vertical line, as well as creating different branches of government, which to a certain extent has been done. We were looking at five or six branches of government. If you look at the end result, the various Chapter 9 institutions are effectively different branches of government. You no longer have just the judiciary, the legislative and the executive. You also have an accounting branch of government within the Auditor General, a redressing branch of government within the Human Rights Commission and the Public Protector, an electoral branch of government with an independent Electoral Commission and a couple of guaranteeing branches of government within the Independent Broadcasting Authority, now renamed ICASA and to a certain extent with the Reserve Bank. The latter is really a misnomer, as the independence of the Reserve Bank and with it the free rule of the bankers were inconceivably protected in the constitution only because people did not fully understand what the Reserve Bank was all about. So the branches of government were multiplied.*

Again, the constitutional materiality has overtaken the formal thinking of constitutionalists in that the different branches of government are different only in name when they're all staffed with people who are not different and don't have a perception of their different role. The culture of deployment of people out of the same center of power, Luthuli House, gets people to look at themselves as working together as part of a movement, a liberation movement that is trying to achieve collective goals. The notion of a dialectic process in which progress is

achieved through juxtapositions is often foreign to African culture and practice. This mindset has defeated the dialectic that should take place within these different branches. They should be in juxtaposition to one another, they should be criticizing one another and at times be antagonistic, but this has not happened.

If you look at the Public Protector, whose constitutional function is that of exposing scandals and compare his work and his budget to the work and the budget of a newspaper like the "Mail and Guardian", you'll see how the "Mail and Guardian" has outperformed the Public Protector by a large factor in respect of all that which should have been done by the Public Protector.

By the same token, the Human Rights Commission is institutionally charged with protecting rights, most likely violated by government. If you compare its budget and its work with the many challenges brought by NGOs, human rights groups to protect rights in South Africa, the NGOs and the human rights groups have achieved much more than the Human Rights Commission with much smaller budgets. Take the TAC (Treatment Action Campaign) which brought the litigation against the restrictive policies on HIV (human immunodeficiency virus) and AIDS (Acquired immune deficiency syndrome) treatment or the groups which protected illegal aliens or the gay and lesbian groups. These are challenges that the Human Rights Commission had the duty to undertake. The court action to enable the Dalai Lama to enter South Africa was brought not by the Human Rights Commission, but by single groups and individuals, mainly Buthelezi and I.

So why didn't they do it? Why did they stand down? There is a report by Professor Kader Asmal that is really a report of a parliamentary committee, which identifies the evil in the perception of the role which Chapter 9 institutions think that need to perform: they see their role as advising government, supporting government, being in a consultative position of government. Now that's a factor of mindset. It becomes very difficult when you draft a constitution to legislate mindset and the African mindset is one of either enemies or friends. There is difficulty in understanding a pure juxtaposition of roles which doesn't degenerate in confrontation. That's something that needs to be taken into account.

One entity which I think is of immense importance is the independent Electoral Commission. The independent Electoral Commission has performed up to expectations and its value is not as much appreciated. What could have happened had it not been there, in the context of everything else? Yet, the weakest link of the South African constitution is in the lack of provision about electoral law and the provision that enables the leaders of political parties to have total control over members of Parliament and members of provincial legislatures. If at any time, the party to which he belongs terminates the membership of a member of Parliament or member of provincial legislature, for whatever reason, then the member automatically vacates his parliamentary position. Effectively all members of Parliament, all political representatives, are accountable to the leaders of political parties and are employees of political parties. That conflicts with constitutional principles. The provision that enables party leaders to terminate the employment of political members collides with the principle present in most constitutions, especially in Europe, that a member of Parliament, an elected political representative, represents the nation in its entirety, without a mandate. It is only accountable at the end of his term in point of reelection. We fought this during the negotiation process. It was one of the elements in which we challenged the certification of this final constitution as being inherently undemocratic. We lost both battles and this aberration carried over.

When we were in Home Affairs, Buthelezi established an electoral commission which we staffed with the best people we could find, people of the stature of Fink Haysom who was the advisor of Mandela, Professor Wilmot James, and Dr. Van Zyl Slabbert as its the chairman. They formulated a report in which suggested abandoning the proportional representation list system and adopting a mixed system between constituency and proportional representation, as is the case with the German model. The same system has been adopted in South Africa in respect to local government elections.

In that system, 50% of those to be elected are elected in single name or two or three name constituencies. They cannot be fired by anyone. They respond to their constituency. The other 50% are elected on a proportional representation list. The proportional representation list is utilized to correct any discrepancy that the constituency system creates and any distortion of a proportional outcome. Technically speaking, on the straight constituency system, somebody with 51% support could have 100% of the seats. Utilizing the two systems on a 50-50% basis, proportional representation is utilized to correct the discrepancy. So if 51% of the constituency gets 100% of the seats it will get nothing on the PR side. If it gets 0% will 100% of its seats on the PR side and everything in between. The outcome remains proportional.

The problem with a proportional list is that people vote for a list. In an African context, this means that voters vote for a leader and whoever comes with him and you get situations like my own example, where I have been put on a list. I'm a member of Parliament. I don't think anyone would vote for me. So these are the limits. The strengths of political leadership, not just the leader but the entire clique within the headquarters of political parties, controls the elected representatives of the people. In turn, this spells out the weakness of parliament and the nonfunctioning of parliament as a check on the executive. The only and final center of accountability in the inner core of the ruling party.

In a South African context, within the first ten years, we passed about 800 major pieces of legislation. Some of them were major reforms that, in other parts of the world, would require a decade of discussion and refinement. Here, they were all passed together and at the same time. It was all done at the executive level. The legislation was drafted at the executive level. It was put through parliament and adopted without any change. Parliament exercised the function of a government liaison officer between government itself and the people on the ground. Parliamentarians explain to the people what the legislation is about, by holding public hearings to make them familiar, rather than independently applying their mind to the legislation or rather developing the legislation to begin with.

The end result is that most of the legislation adopted by parliament has never been substantially amended by parliament. Even when they try to amend the legislation they end merely begging the Minister to do so. I drafted the entire reform of the system immigration, and notwithstanding the fact that the majority in the parliamentary committee hated my guts and my work product, in the end they couldn't amend it because they didn't have the capacity to do it. Within the parliamentary context, there is a major anomaly. The constitution gives to each member of parliament the fundamental right of introducing a bill, no matter how silly or stupid it may be. However, in this parliament that power has been taken away by the rules of parliament which have been amended recently for that purpose, making this parliament even less democratic in that respect than the apartheid government was.

In terms of those rules, a member of parliament can only introduce a proposal, not a bill. The proposal is then submitted to a private members committee, which by means of majority, decides whether or not that bill should be taken to the next step. If they decide to turn it down, that's the end of the proposal. If they decide that the proposal is to be taken to the next step, the member is given the permission to draft a bill which comes back to the private members committee. They look at it a second time and only after a second approval, may the bill go to the committee where it is going to be looked at on the merits.

So that means that only if the parliamentary majority gives a member permission to have a bill, can a member of parliament introduce a bill in the legislation. Now there is no functional reason for that, it is purely political. It is to reduce the exposure that an opposition member of parliament or a back-bencher from the non-ruling party may have, in case he or she develops a good idea. If one comes up with a silly idea, it takes one second to get rid of it. All the committee needs to do is to put it on the agenda, vote on its desirability and within five minutes they can just vote against it and that's the end of it. I have committed myself to challenge in court this unconstitutional state of affairs.

There are a number of battles that need to be fought still, to turn this South African parliament into something real. I don't have a dedicated secretary, I don't have a legislative assistant, I don't have a personal assistant. That is all part and parcel of the efficacy of a member of Parliament. Without a parliamentary research service, without all the necessary infrastructure, shuttled as we are from one committee to the other, we become mere audience to decisions taken elsewhere. We are constantly bombarded by information tailored not even to a minimum common denominator, but to the least proficient members. Parliament is constantly in an educational mode where members of Parliament are constantly being educated or indoctrinated rather than, at any given time, being in an effective, deliberative mode where people decide and discuss issues.

So between the power of the executive to effectively draft and pass through all the legislation and the limits to parliamentary activity, the core of South African democracy remains still very weak. It requires action to be strengthened. I think there is now a window of opportunity because of the perception that President (Jacob) Zuma, wants to empower parliamentary committees. There is a much lesser sense than during (Thabo) Mbeki of waiting for the executive, Luthuli House and the top to give their sign to mark the direction. The Mbeki administration had lots of opinions so people were not willing to move in any direction or express any opinion until they knew what the party political bosses wanted. The Zuma administration is much less opinionated so there is now a season of much greater freedom within parliament. Whether or not it will last remains to be seen.

SCHER: In December 1992 and then 1995, when Inkatha submitted their constitutional proposals or their constitution, that document, from what I understand, was received quite well, but not as well as it perhaps could have been.

AMBROSINI: *There are three documents, four documents, five documents. First, there is the document that we presented in December 1991. That was a document way ahead of debate, in which we stated that we wanted a constitutional state, a constitutional court and a federal state. It described the division between the powers of the federal government and the state government. At that point, the entire discussion was about process, whether or not we should go to a*

constitutional assembly first, viz. one-stage, two-stage. I like to think that such document made an impact and forced the ANC to recognize their arch rival was overtaking them on the left and introducing all these aspects which they had not thought about. "Should we or should we not have a constitutional court"? We were the first to say we must have a constitutional court. There are not many countries in the world without a constitutional court. A constitutional court is the best method to guarantee the supremacy of the constitution, but not the only one.

This applies in respect of whether we should have first, second or third generation human rights. We said we needed third generation human rights. All that was not within the ANC's scope of negotiation and reflection. That first document listed what we were suing for.

Then the negotiation on the process continued. It broke down with the Boipatong massacre, the UN Security Council resolution, but then it came together with the Record of Understanding. The Record of Understanding fractured South Africa centering negotiations in the ANC-NP bilateralism. Out of that fracture, we took another initiative that replaced the debate on substantive constitutional issues. We placed ourselves ahead of the debate, because we were cut out of what the debate was. It was done bilaterally between the National Party and the ANC. So not having a seat or a say at that table, we spoke very loudly from the side. In December 1992, the erstwhile KwaZulu government adopted a fully-fledged constitution in a formal seating, as the constitution of the state of KwaZulu-Natal, thereby theoretically, perhaps symbolically, establishing the entire province, unilaterally, as a member state of a federation to be established at a later time. I drafted that constitution and worked through all its details with Buthelezi. Buthelezi projected the image that we'd done our bit and all that remained to be done in the rest of the negotiation was to create a federal constitution and state constitution for the other components of the country. We suggested that we were happy together in KwaZulu-Natal as we were, and that the rest of the other regions should decide how they wanted to organize themselves. We suggested the principle of asymmetry so that one could have even had a unitary state with certain regions under the direct control of the national government while KwaZulu National and others regions could be federal states.

From a procedural viewpoint, that was a flop because it didn't produce the type of mobilization we thought it would. Especially the white population was indolent, not willing to buy into the alternative process that Buthelezi was suggesting. Buthelezi's challenge was addressed by ignoring it. They were not accepting the challenge. It was regarded as if it did not exist. But from a constitutional viewpoint, I would like to think it had a major, major impact. The 1992 constitution of KwaZulu-Natal broke down a number of walls. It outlawed the death penalty and had the right to abortion, it had environmental rights. You name it, it had it. They were all there. And there was nothing remotely similar on the South African constitutional landscape or negotiating table. If you made a study of the list of rights contemplated in the constitution of KwaZulu-Natal of December 1992 and those which were eventually encapsulated in the interim constitution and then from there in the final constitution, they're all there and similarly phrased. That was the first Bill of Rights introduced in the negotiation process, ahead of anything else, including documentation from ANC, IDASA, Institute for Multiparty Democracy, et cetera. That was the second document.

The third document we submitted when we resumed negotiations. That was a mirror document in which we took the constitution of KwaZulu-Natal and we drafted into it what was our image of a federal constitution so that the two of them

could be read together. We introduced that in the negotiation process. Then there were a variety of other documents that we produced throughout the entire negotiation process of actual drafting, up to 1994. The most important of them was the so called Yellow Paper in December 1993 which formed the basis of the last minutes amendments made by Parliament to the interim Constitution in March 1994 to accommodate us.

In the constitutional assembly, we tried again to play a role ahead of debate: we didn't have the power, but had the brains. That was our approach. We were so much ahead of everyone else that (Cyril) Ramaphosa, Chairman of the Constitutional Assembly, scolded the ANC by pointing out how effective the IFP was in its constitutional submission. "At least the IFP knew what it wanted". At the time Johnny de Langa made a very snotty remark. He said in Parliament, "We could do the same if we were also a one-man band." I don't know whether he was referring to Buthelezi or to me.

In each and every issue we produced a full document, listing what we wanted, all the alternatives and an evaluation of all the options. We then explained why our options, our view was preferable to the other listed alternatives. I hope that the enormous amount of work that was conducted under the wonderful political stewardship of Lionel Mtshali had a very good impact in helping people focus on what the constitutional debate was all about, while also sorting out a huge amount of nonsense coming from the process of public participation, in an environment in which a great many members of the constitutional assembly were not lawyers. If you compare the number of law degrees in other constitutional assemblies, for instance France, Italy, or Germany as to what there was here, there were lots of people who legitimately felt that the constitution was supposed to address things that usually are not in a constitution. By focusing the debate on what ought to be in a constitution, we hoped we made a valuable contribution.

SCHER: I've heard some commentary from the time and it seems that some people saw the federal powers that you envisaged as being so strong as to almost promote secession. How did you respond to those sorts of comments?

AMBROSINI: *It was not a rational argument. As I said, we produced that document to re seize a space of political initiative and attention that we had lost as the ANC and the National Party came together in a political agreement. The response was that of ignoring us, discrediting us, mislabeling our proposals and not going into the merits. This was done by calling our document a secessionist document, and all sorts of other things, rather than engaging on its merits. As in any document, anyone could have found in it a measure of good and a measure of evil. But the entire document was disregarded and Buthelezi was sidelined by calling him a secessionist and a spoiler. Well, there was no intention to secede. If we wanted to secede, we would have said so and done so and many people say that perhaps Buthelezi should have done so. Buthelezi didn't. He never stood for secession.*

SCHER: One of the questions I want to ask you. From some interviews I've read that you gave closer to the time, was the issue of the prominence of traditional or customary law that the KwaZulu constitution dealt with and which I understand you felt a federal model was particularly well set up to provide.

AMBROSINI: *Yes, actually that was a difficult compromise. Neither the KwaZulu-Natal constitution of 1992, nor any of the constitutional proposals that we made until February 2004 dealt in any way with indigenous and customary law, traditional leadership or the issues of the kingdom of the king. There are a variety of*

reasons for it, not least my ignorance and my learning curve. The fact is that within a federal model, those things could have been handled directly by the member state. If KwaZulu-Natal had been granted the type of powers and functions which we envisaged for a federal state possibly on an asymmetrical basis for KwaZulu-Natal only, or on the basis of all provinces receiving the same powers and functions, then it would have been very simple to deal with these matter at the provincial level because the residual powers, the powers relating to personal matters of status, inheritance, contracts, et cetera could have been organized at the provincial level.

In South Africa, there is a plurality of legal systems. People marry by different laws, conduct commercial transactions by different laws. They dispose of property by inheritance by different laws. That has been the case since the beginning of this country. However, the law of the white people became the law of the country in 1994, without having ever been the law of the country until then. Now there is a single inheritance law, a single commercial law, a single contract law which are foreign to the majority of the people whose laws have been pushed into an area of legal limbo, to be dragged back into relevance only when relevant or desirable to the customary court or the tribal courts. It still is one of the profound unsolved problems of South Africa.

If you look at the land issue, the entire matter is based on a different conception of property law. The black people always felt that they owned their land. Yet to this day the majority of the land of all the black people is still classified as state land. The instrument that was supposed to breach this gap, the Communal Land Rights Act, has not come into force yet, because there are enormous difficulties in dealing with its regulations. So Buthelezi's house is on a piece of state land. I'm talking about KwaZulu because it is an area that I'm familiar with, but the same applies to Ciskei and Transkei. They're all living on land that, from a deed viewpoint, belongs to the state. This is what the difference in a legal systems is all about, because from the viewpoint of indigenous and customary law, the land belongs to the community and it is assigned, by the traditional leader, to a specific person under certain conditions which are either tied to the life of that person, or to the purpose of for which the land is used, or to the rules of inheritance which enable that land to be transferred, within certain criteria, within the members of a community only.

All this is trying to be legalized and brought within the language and parameters of the dominating legal system, which was the original white people legal system. The Communal Land Rights Act tries to do exactly that, viz. to translate it. It does that by having regulations and then each community needs to adopt a constitution. In that constitution, all these rules of indigenous and customary law would be subsumed. It is difficult and it will not work. I'm not the only one who realized it. They stopped the process and they went back to the drawing board, but the issue remains.

Let me give you another dimension of the debate. How do you break up a country? The ANC did not want to recognize ethnicity. The entire territorial components were ethnic based. The eight self-governing territories and the four nominally independent states were ethnic based. So they began dividing everything. In the regional proposal, the proposal finalized between the National Party and the ANC, KwaZulu-Natal was divided in two provinces. Buthelezi objected to that strenuously. KwaZulu-Natal had to be unified. But they broke up the Cape Province into three provinces, the present Northern Cape, the Western

Cape, and the Eastern Cape. We opposed it because administratively, it didn't make sense.

The chickens came home to roost, because the Eastern Cape collapsed many years ago and is beyond repair and the Northern Cape met a similar fate. The root cause of that is the failure of the process of rationalization. In 1994, when the country was unified, there were different administrations: an administration for the whites divided in a national government and four provinces, one for the Indians, one for the coloreds and twelve for the blacks,.

Among all these, the strongest, most efficient and better resourced were the white administrations. As we rationalized, we merged all these administration in KwaZulu-Natal the benefits of the white administration, which was more efficient and better resourced, could be merged into the others. But in the Cape Province, the white administration was far better, more resourced and more skilled than the administration of the black governments, the Ciskei and the Transkei governments. By breaking up the provinces, they isolated the core of expertise and administrative capacity in the Western Cape. The Ciskei and the Transkei, which were dependent on Cape Town, were left to their own means and the entire thing has collapsed since they couldn't rebuild an administration like Western Cape's. The same thing happened for the Northern Cape, and Limpopo which was dependent from the core administration of Pretoria, the then Transvaal.

The failure of many provinces has been caused to the ANC fears of having very strong provinces and its obsessive desire of breaking away with history and not wanting to have the four provinces, in spite of the fact, that their administration wasn't that bad. It was the way it was, because self-governing territories and TBVC (homeland) states were directly or indirectly supported and assisted by the provincial administration within the white structure. When those arterial lines of administration were broken, provinces ended up having to develop capacity in an environment where the state couldn't supply the necessary resources.

As you know, after 1995, there was a moratorium on the hiring of people in the civil service. All these provinces have not become what they should have become, administratively. We are now rethinking the function of provinces in South Africa, within this context. There are many voices that say: "let's abolish provinces". What they're really saying is let's abolish provincial legislatures. I don't think anyone wants to abolish provinces per se, but they talk about leaving provinces with an administrator and eliminating the legislative component at the provincial level, which is something else. Seeing where we are, reflecting on legislatures not being a separate center of policy formulation, on their not being a check and balance or an element of political dynamics, perhaps such calls are not unmotivated.

I think that in another ten years, we'll see whether provinces could become what the constitution envisaged them to be.

SCHER: I'm quite struck by that because that's quite a damning indictment of the capacity of the provinces to be a center of political dynamics, from somebody who worked for many years to try and get the provinces those sorts of powers. That's quite a statement from somebody such as yourself who has advocated this system.

AMBROSINI: *All you need to do is go and look at a book of provincial laws and see how many laws they've adopted: very, very few. All those which are adopted are within the*

parameter of the provisions of national laws which called for those provincial laws to be enacted and for those specific provisions to be enacted. So, it could have been done by regulation.

SCHER: In your opinion, given the relative lack of capacity and the lack of political dynamism that is being showed by the provinces currently, do you think in the early '90s it was realistic that the provinces could have been something different?

AMBROSINI: *If correctly done, yes. If you look at KwaZulu-Natal and the Western Cape, I think that they've proven that they could. We wanted the four provinces to remain as they were and they would have been different. Political dynamics are also important. A province cannot deliver its role every time and often all it takes is to asset autonomy a few times to make an overall difference. I think that one of such main occasions was the HIV/AIDS issue. It is an issue that through mismanagement, sheer stupidity, and criminal negligence on the side of the state, has claimed the lives of hundreds of thousands of people who have died without having to die.*

Buthelezi became involved in it. It was a difficult process for him personally, having to go community to community, to begin speaking about the facts of sexuality within a cultural background where people didn't speak about sex. But he was approached by various companies and entities which pointed out that the major problem was the mother-to-child transmission of HIV/AIDS. It could effectively be prevented by means of a single inoculation of the mother of Nevirapine and a spoonful of Nevirapine to the child, at the time of birth, with no known side effects.

We began doing it in KwaZulu-Natal, while the rest of the country was not doing it. Lionel Mtshali was the premier with an ANC provincial minister, (Zweli) Mkhize, now the Premier of KwaZulu-Natal, gave the order for that not to happen. Mkhize wouldn't do it. Mtshali did it. I got involved with Richard Sizani our then Director General. We went around, both of us lawyers, trying to understand how it all worked. He gave the instruction, that in certain areas of KwaZulu-Natal the procedure was to be performed prophylactically. There was 40% infection rate. The notion is that you could not test people for HIV/AIDS without informed consent and without counseling. It was practically impossible to give informed consent and counseling to each and every mother that had to be tested. So Mtshali gave an instruction for everyone to be given Nevirapine at the time of birth unless they chose to opt out, which they could without informed consent and counseling. It was an opt-out of a prophylactic program. Forty percent of people stood to die, it was necessary.

The central government refused to do the same and told us it could and should not be done. The TAC, the Treatment Action Campaign, took them to the constitutional court, challenging the fact that an action of government was violating people's constitutional right to health. The case was before the constitutional court and the defense of the national government was that even though what the TAC was suggesting was desirable, it was not feasible. Government did not have the resources to do it, no matter how much we wanted to do it. The case was effectively lost until the province of KwaZulu-Natal came in as an amicus curiae, as an intervention. At Buthelezi and instance it intervened, advising the court that KwaZulu-Natal was doing it, that could be done and that was feasible.

As the Premier, Lionel Mtshali, intervened, there was a cross application from his own Minister of Health, Mkhize, for Mtshali to get out of the constitutional court on the basis that Mkhize, as the provincial Minister of Health has the sole competence on the matter, and Mtshali did not have the authority to intervene on a health matter. So before moving further, the constitutional court had to decide who had the authority to intervene. Looking at the constitution, it determined that all the executive authority vests in the Premier and therefore the Premier could intervene even in a health matter. They kept Mtshali and kicked out Mkhize. So Mtshali could finally make the submission, through his lawyers, that that program was feasible and could be done. Only on that basis could the constitutional court decide to order the national government to do it, because the constitutional court would have not been able to overcome the factual issue of "we can't do it." The statement we can't do it is not capable of legal rebuttal and the constitutional court does not try factual issues.

When the province of KwaZulu-Natal attested it could be done, a watershed judgment, which changed perceptions, challenged authority, opened up debate within the ANC, could be rendered. This is an example of a single instance in which a single province did something. Does that excuse years of inaction, an otherwise meaningless existence? I don't know. It is an issue open for debate. One does not know when again a province can stand up on a matter of importance and this was a matter of importance for hundreds of thousands of people died.

SCHER: That certainly demonstrates the possibility for properly capacitated provinces to take an active role in national politics.

AMBROSINI: *That's one side. On the other side, the same possibility and capabilities are available for corruption, dis-efficiency, abuse of tender processes and absolute waste of money, which is what is taking place at the provincial level in a manner that is now out of control, especially in certain provinces. Autonomy is defined as the power to err.*

Just a thought about an important postscript that is not often highlighted sufficiently on the institutional debates about Africa, and that is about the organization of the form of government. We have discussed a lot about the form of state, whether it should be a unitary state or a federal state, but the form of government is about the organization of the executive and the relationship between the executive and the legislature.

Throughout black Africa, without exceptions, you have only presidential republics. There is not one single parliamentary system. Even those constitutions, and there are a couple of them that make provisions for a prime minister, when you analyze them correctly, the prime minister is nothing but somebody deputizes for the president. It is a misnomer. It is a mischaracterization. The prime minister is in fact a deputy president. So they are all presidential republics.

At the outset of negotiation, we put forward a model of a classic parliamentary democracy in which the offices of head of state and head of government would be clearly separated. I don't know whether that was because we proposed it, but in the end, the other parties forced a mixed system in which we still have a presidential republic, with the curious element where there is a vote of no confidence. Parliament has the power of passing a vote of no confidence. However, the offices of head of state or head of government are unified in the same person.

In the last legislature, Buthelezi introduced a private member's bill to amend the constitution and to split the offices of head of state and head of government. It was good timing. It was not a new proposal, it has been part of the IFP proposal since the beginning, but it was responsive at that time to the tension rising between Mbeki and the new faction that wanted to express Zuma as the new President. They could have accommodated the continuation of the Mbeki presidency, as the head of state, and Zuma, as the head of government. But irrespective of the circumstances at the time, I strongly feel, as Buthelezi does because he introduced the bill, that within an African context it is important to create a paramount president who reigns but doesn't govern, and has the power of admonition, the power of criticizing and the power of moral leadership. It is very, very important to restrain the head of government, which in this case would be the Prime Minister.

In the present context, our president is unrestrained, unrestricted and unlimited. The risk to democracy and the institutional deviations of the type of this presidential figure are seen all over Africa and we have seen a case in South Africa with the Mbeki presidency and murderous HIV-AIDS issue. To a certain extent, during the Mandela's presidency, we had a head of state and head of government. Mandela went on record very often, even when Bill Clinton visited South Africa, referring to himself as the de jure president and pointing to Deputy President Mbeki, as the de facto president. In fact, Mbeki presided over almost all the meetings of the cabinet. Mandela rarely if not never presided over the meetings of the cabinet. But that worked, because Mandela was in the background, providing moral leadership and ready to step in whenever something went wrong. As soon as Mandela stepped out, the Mbeki presidency produced two or three aberrations and those aberrations were partially corrected, because Buthelezi internally provided moral leadership by virtue of his hereditary stature, political stature and age. Had it not been for that, there would not have been any institutional mechanisms to correct them.

The first one was on the issue of HIV/AIDS, where the President, out of his personal convictions, turned scientific decision into a matter of policy causing the untimely, horrible death of hundreds of thousands of people. It was an aberration which could not be corrected. Had there been a prime minister, the President could have called him and said: "hey, you are ruining the country."

The other issue was with Zimbabwe and the third issue was the denialism of the crime situation. Again, Buthelezi was the first black leader who stood in parliament and said, "I don't know anyone in South Africa who has not been a victim of crime or fears to become one." To which the President, himself, responded by saying, "Dr. Buthelezi, I don't know anyone who has been a victim of crime." When Mbeki said that, the country reacted and said, "Well, in what world do you live, because we all do".

Ordinarily this type of checks and balances are provided by the role of the opposition. If you look at the situation in this country as well as in many other African countries, for whatever reason, the opposition becomes discredited. The press becomes discredited. Whether it is South Africa, Namibia, Zimbabwe, or wherever throughout Africa there have been major crises in the institutional machinery, whatever the opposition or the press say or do ultimately does not matter. One can see denunciations by the opposition and by the press of scandals, impropriety, malfeasance, malgovernance with absolutely no effect or very little effect in correcting the problem.

The head of state might have a much greater capacity of becoming sensitive to problems of this nature and reining in a head of government who has gone astray in general or with reference to a couple of specific issues.

SCHER: May I ask you a question based on the Kenyan situation where you have a prime minister and a president as part of a political settlement, you would think that these checks and balances—

AMBROSINI: *But read carefully the constitution in Kenya. The prime minister is prime minister, in name only. He is a deputy president. He deputizes for the president. He doesn't have powers of his own, but those that are delegated to him. Nowhere in black Africa is there a prime minister who is head of government and a president who is head of state.. I think in Somalia, there is a division in the offices between head of state or head of government, but nowhere in black Africa is the head of state separated from the head of government. Zimbabwe is the same thing, you've got the president and the prime minister who effectively is a deputy president. Constitutionally all the executive authority vests in the president and the prime minister only has the authority that is transferred to him by the president, so they are really misnomers. They are not prime ministers within the western constitutional tradition as they are in England, the Netherlands, Belgium, Italy, or Spain. In an African context, as per in the separation between federal powers and state powers or national powers and provincial powers, it is always advisable to have clear differentiations between the powers of the head of state and head of government, The rule should be: "this is mine and this is yours", with mutually exclusive powers between the national and the regional levels of government, and a clear distinction of power between the head of state and the head of government. Obviously, out of those distinctions, there is a sector of inferences, dynamics and dialectics that develops, so that even though powers are separately identified they remain in constant interaction. Yet it's important there is clarity on the respective starting points.*