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SOCIAL AND ECONOMIC RIGHTS: CAN THEY BE MADE JUSTICIABLE?

*Justice Albie Sachs**

AN: Announcer

AS: Justice Albie Sachs

AN: Good afternoon. We are honored to have with us for the second time in a year Justice Albie Sachs of the Constitutional Court of South Africa. Last year, Justice Sachs spoke about the Truth and Reconciliation Commission, an event in which he was very personally involved. In giving what I thought was one of the most poignant talks that I have heard, he focused on the story of Henry, a stranger who visited his chambers. This man turned out to be a very important person in Justice Sachs' life because he was involved in doing the reconnaissance for the bomb that almost killed Justice Sachs and which deprived him of one of his limbs.

Justice Sachs' car was bombed on April 7th, 1988 in Moputu, Mozambique, where as an exiled freedom fighter, he was working on what was to become the New South African Constitution. The anniversary of the bombing was this past Friday. He chronicles his experiences and his recovery in his book, *The Soft Vengeance of a Freedom Fighter*. A recent new edition of his book has just been released which includes a foreword by Archbishop Desmond Tutu and a new epilogue by Justice Sachs.

The title of his talk today is, "Social and Economic Rights: Can They be Made Justiciable?" It is my honor and privilege to welcome my friend back to the law school, Justice Albie Sachs.

AS: Our chickens are coming home to roost. My generation of lawyers in South Africa fought long and hard for social and economic rights to have the status of enforceable constitutional rights. Now, as a member of the Constitutional Court, I am soon to hear a case known by the title of the main plaintiff, Mrs. Grootboom, which literally means "big tree." In this, we have to determine exactly how, if at all, we can actually enforce social and economic rights.

I think that just about everyone agrees that shelter, education, nutrition, clean water, and basic health services should be universally availa-

* Justice of the Constitutional Court of South Africa. Justice Sachs delivered this lecture at Southern Methodist University School of Law, Dallas, Texas, on April 10, 2000.

ble. That is not controversial. One of the responsibilities of government, whatever its nature and whatever the society, is to ensure at least the minimum decencies of life for all its citizens. What is controversial is whether claims to such decencies should be regarded as enforceable fundamental rights in the constitutional order, in a way similar to the classic freedom or liberty rights and the great civil rights of the citizen: to vote; to speak freely; to be elected; to participate in government; to enjoy a measure of privacy from state intrusion; to have certain rights in relation to property; and generally to be a free person in a free society. The issue has provoked profound debate in my country.

In the middle 1980s—which to many of you may seem like long, long ago, and to me is yesterday—a group of black students at the Law Faculty at the University of Natal in Durban set up a body called the Anti-Bill of Rights Committee. I think it was the only committee in the world created with that title. There are many oppressors who deny fundamental rights, but why should black students who belong to an oppressed community anticipating a new constitutional order associated with liberation, set up an Anti-Bill of Rights Committee? I was in exile at the time. I was shocked when I heard of their initiative, but I understood their motivation.

These students saw a bill of rights as a document established in advance by a privileged white minority to ensure that when eventually one-person, one-vote majority rule came to South Africa, and everyone was at last able to enjoy the ordinary rights of citizenship, a bill of rights would be in place to block any moves toward major transformation. In effect, it would defend the status quo, guarantee property rights, and impose extreme limits on the capacity of the democratic state to take decisive action to achieve meaningful redistribution of wealth. Remember the situation at that time in the country: 87 percent of the surface area of South Africa was reserved by law for whites only, including all the central business districts and all the beautiful tree-lined suburbs. We were not dealing simply with the kind of inequalities between rich and poor that you could find in most, if not all, societies. We were confronted with state-enforced separation which allowed for the extensive accumulation of resources and power by a racially-defined minority. And there was corresponding state-enforced dispossession of the majority, which led to the marginalization of their languages, the loss of their land, and a global reduction of their dignity and status. In that context, a bill of rights was seen as a “bill of whites”—not to defend the fundamental rights and freedoms of everybody, but an instrument enacted in advance to ensure that those who had would continue to have forever, and those who had not would remain without forever.

I immediately wrote an article espousing the need for an “Anti-Anti-Bill of Rights Committee.” I did this partly for diplomatic reasons—what kind of freedom struggle takes up an anti-bill of rights position? A bill of rights would be our answer to apartheid. Apartheid said that black and

white could not live together as equals in one country, that they had to have separate institutions, separate rights, and live in separate areas. Our reply was that minorities and majorities could live together as equals provided everyone was constitutionally protected against abuse, irrespective of their language, color, religion, origin, background, or ethnicity. A Bill of Rights would thus play an important political role in South Africa, countering any new project to refine and modernize apartheid. It was also needed because many liberation movements in different parts of the world had acceded to power and then gone on to abuse the rights of the very people on whose behalf they had fought.

But there was another reason as well: we needed a clear constitutional framework within which transformation could take place. There had to be deep change in South Africa—we could not just carry on with a small minority enjoying all the good things of life while the overwhelming majority continued to suffer deprivation, malnutrition and indignity. Such a country would not last; a house so divided against itself just could not stand.

The difficulty was to ensure that the process of change itself was fairly conducted according to agreed principles and not according to the whim of whoever happened to be in power at any particular time. One important way of achieving this was to locate transformation in a rights framework. I advanced the vision of social and economic rights as integral elements of a future bill of rights. In this way, the least amongst us, who happened to be the majority amongst whom we were, would be regarded as important, as people and citizens worthy of being respected and capable of enjoying dignity in the land of their birth.

It was in this article that I introduced the concept of the “three generations” of rights. The first generation encompasses the classic freedom rights which emerged from the American and the French Revolutions: the rights of the citizen and the free person. This notion is fundamental to your Constitution. People refer sometimes to the “firstness” of your First Amendment, which provides for freedom of speech and freedom of religion. It does not deal with education, with housing, with health. It establishes a particular vantage point or conceptual platform from which to see all the other rights. Social and economic rights are not included.

The second generation of rights emerged in Germany under Bismarck, an authoritarian leader of the late 19th century, who established a scheme of welfare rights for German workers. Later reinforced by the impact of the Russian Revolution, these rights came to be central to national policy in the so-called welfare states of the 20th century. The recognition of rights to education, to health, to housing, and to the other minimum deficiencies of life drew strong support after the Second World War from the Universal Declaration of Human Rights. Such rights were ultimately entrenched in the International Convention on Economic, Social and Cultural Rights, and although this document has not been ratified by all the

states in the world, it is widely accepted as containing universally recognized principles of human rights.

The phrase "third generation" of human rights was coined by a Czech functionary in the United Nations whose object was principally to advance environmental rights, such as the right to a clean, healthy environment. He argued for solidarity rights which belonged to the whole community, not just to individuals, including the right to development.

Initially, I argued strongly for recognition of all three generations of human rights. That initiative has now come back to haunt us! We are not simply pushing for what we believe should one day be in a new South African constitution. We are interpreting the actual text of an explicit document containing clear constitutional commitments. If someone asks: "Who was that stupid person who introduced the three generations notion in the first place?" I have to answer: "It was me!" Certain critics contend that if you speak about three generations of rights, you suggest that the second generation is less important than the first generation, and the third generation even less important. Others argue that aspirational and unenforceable socio-economic rights dilute the Bill of Rights as a whole, and undermine the classic first generation rights. Yet at the international conference on human rights in Vienna, a decade ago, it was accepted that social and economic rights are indivisible from and interdependent with civil and political rights.

Social and economic rights were in fact written into the final text of our Constitution in extensive and explicit form. The great battle was not so much over *whether* social and economic rights should be incorporated, but over *how* they should be incorporated: as justiciable rights in the ordinary way, or as mere directives of state policy. When the Irish won independence from Britain and drafted their constitution, they said in effect: "We want to have social and economic rights, but not as the kind of rights that you can go to court over in order to get an injunction in your favor in the ordinary way. So we will put them in the constitution, not as a justiciable part of a bill of rights, but as directives of state policy—as programmatic indicators rather than enforceable rights." Thus, a grand preambular section elaborating the functions and the duties of government was included.

India followed, producing a strong constitution that has stood up to many social fissures and strains, one that has been creatively interpreted by an outstanding Supreme Court. India has simple directives of state policy in its constitution expressing non-justiciable rights, but the Judges used the directives of state policy as a means of interpreting the justiciable rights. Some say they smuggled socio-economic rights in through the back door (and down the chimney, or through the window).

A very famous case concerning the eviction of pavement-dwellers in Bombay illustrates this. The people facing eviction slept on the streets, sheltered at night under the little barrows from which they traded. The Indian Supreme Court said that the right to life does not just mean the

right not to be killed. The concept does not imply only that the state cannot take your life away without due process: it affirms the principle that you have a right to a livelihood, to some minimum decencies, of which you could not be deprived without due process. The Indian Court thus used the directives of state policy as guiding texts for the interpretation of the fundamental right to life as set out in the section of justiciable rights.

We, in South Africa, went beyond that. We expressly included the right of access to adequate housing and access to health and other welfare rights in the text of our Bill of Rights. We made it clear, however, that these rights would not be enforceable in the same, self-executing way as other rights. The provisions say that the state is under a duty to make these rights realizable through reasonable legislative and other measures, which must serve progressively to enhance access to these rights, bearing in mind the financial capacities of the state. It should be noted that the section on children's rights provides in an unqualified way that children have rights to nutrition and shelter, and does not speak about progressive realization of the rights within available resources.

About eighteen months ago, Mr. Soobramoney approached our Court. He was suffering from chronic renal failure, aggravated by heart disease and blood sugar problems. His story was as follows: when he collapsed, he went to a state hospital and received life-saving treatment. But when he returned on a later occasion, he was told: "We can only give emergency care once; chronic patients like yourself have to line up in a queue for access to equipment that is expensive to operate and requires a large staff. In practice our resources only allow us to treat thirty percent of the patients who present themselves to us, and we give priority to those who could benefit in future from renal transplants, which unfortunately rules you out." To which Mr. Soobramoney said: "The Constitution says I have a right to life. It says no one shall be refused access to emergency medical treatment, and grants everyone a right of access to health care. I insist on my constitutional rights."

This was a most painful case. The Court's decision could help prolong his life or else conduce to his early death. We had no precedent to help us. Our sole guide was the Constitution. We decided first that he could not claim emergency medical treatment on an open-ended basis that would give him an unqualified right to indefinite medical assistance. The notion of a constitutionally protected, unqualified, and immediately realizable right to emergency treatment applied to someone who collapsed with a sudden heart attack, or who was the victim of trauma. Such persons could not be turned away from casualty wards, certainly not from those in state hospitals. If all chronic illnesses were to be treated as emergency medical cases entitled to treatment on demand at state expense, then there would be no funds left over for mother and child care, nothing for health education or immunization, and desperately little for amelioration of AIDS-related illness, TB, or cancer. That could not have been

what the Constitution required. In a concurring judgment I stated that being placed in a queue for access to scarce resources is not to find yourself being subject to a limitation of your right, but to be put in a position to enjoy your right together with others. You do not ration free speech or the vote, but you have to ration access to resources. So, provided the queue is fairly established, and the criteria are rational and non-discriminatory, it was not up to us as judges to say that we thought Mr. Soobramoney should go to the head of the queue. That would have involved arbitrarily substituting our distant and untrained judgment for that of the qualified medical officers concerned on the spot. The situation was almost the inverse of that in your well-known case on the right to withdraw treatment—here it concerned the right to have treatment. Yet, the underlying principles were the same. I quoted from Justice Brennan's minority judgment in following the notion that these agonizing decisions should be taken not as a matter of abstract principle by the court, but by those most intimately involved with the situation, provided that the procedures and criteria they used met constitutional standards of fairness.

Two days later Mr. Soobramoney died. The public was angry with the Court—they felt it should have done something, anything, to save a life. It mattered not that to have upheld his claim as against others waiting for treatment, could well have meant in practice that those with the most money could run to court to get help and leave the disadvantaged without treatment. What we insisted upon was that the criteria for selection for expensive treatment be fair and non-discriminatory. Nevertheless, the NGOs and human rights lawyers, while reluctantly agreeing that the actual decision was inevitable, indicated that they wanted some kind of statement from the Court that would pressurize the state to fulfill social and economic rights, rather than to provide a formulation which would enable the state to avoid its responsibilities.

On the 11th of May the Grootboom case will go well beyond the issues in the Soobramoney matter and confront us with the question of the enforceability of social and economic rights in what the photographers call "full-frontal mode."¹ A community of about a thousand persons referred to in South Africa as "squatters" lived in shacks on a piece of waterlogged land. More than half were children. They are just some of the millions of people in South Africa without secure tenure, all moving from one backyard or piece of land to another. One day, because of the intolerable conditions, they decided to move to a more hospitable area. It turned out, however, that this newly occupied land had in fact been earmarked for a housing development scheme intended for other poor people like themselves. Thus, in a sense, they could be seen as "jumping the queue." They were then evicted from this land and settled on a

1. *The Government of the Republic of South Africa v. Grootboom* was heard on May 11, 2000, and decided on October 4, 2000. For recent judgments of the Constitutional Court of South Africa, see (last modified July 7, 2000) <<http://www.law.wits.ac.za/lawreps.html>>. Though this case is not yet on the website, the case and an explanatory note are on file with *SMU Law Review*.

nearby sports field, since there was nowhere else for them to go. They could not return to the land they had previously occupied because others now occupied it. Their case was supported by the Legal Resources Center, an organization initially established to fight cases which challenged various aspects of apartheid. It felt that this was an appropriate case to test what is meant by the social and economic rights in our Constitution.

This is where the chickens come home to roost. It was one thing in the 1980s to tell people fighting for liberation and transformation that a bill of rights need not only mean restriction on government's power to act, but could also mean that government has an obligation to right the wrongs of the past. When we argued in favor of constitutionalizing social and economic rights, and not simply to make them directives of state policy, we said that these rights were indivisible from, and as important as, other fundamental rights. Now, we have to give some kind of concrete meaning to these affirmations, otherwise people will ask what the point is of having social and economic rights in the Constitution at all. This is not the place for me to anticipate the arguments we will hear, or to deliver any views in advance. But what I can do is to indicate some of the broad themes that I feel might be relevant.

It is said that "the first shall be the last, and the last shall be the first." In a sense, we were the last, but now we are the first. You were the first, and some critics might say that you are becoming the last! To me, for that to result would be the greatest of pities. The United States was the first to constitutionalize and give judicial protection to fundamental rights of the classic kind that I mentioned, the liberty rights. You were also the first to see equal protection as something that needed to be guaranteed by the Constitution and enforced by the courts. It might be, looking back, that the separate-but-equal doctrine was not one of the most brilliant features of your jurisprudence, but, nevertheless the issues were debated, and eventually *Brown v. Board of Education* was decided. The case is regarded by many as providing the greatest legal decision of the 20th century for its sweep, compassion, focus, and its insistence on the role of deep, principled morality at the heart of government. Yet, the discourse in the United States today on expanding concepts of rights so as to include social and economic rights, is extremely limited. The illumination that you could provide is lost, and not only to yourselves, but to the world.

I believe that 21st-century jurisprudence will focus increasingly on socio-economic rights. Not long ago I heard someone describe the 19th century as the century where the executive established control over society, the 20th century as the century where parliament gained control over the executive, and the 21st century as the century where the judiciary will establish principles and norms controlling both parliament and the executive. You might not be surprised to hear that the speaker was a judge, in fact, she was a member of the French Constitutional Council! I believe

she is right. There is growing acceptance all over the world that certain core fundamental values of a universal character should penetrate and suffuse all governmental activity, including the furnishing of the basic conditions for a dignified life for all.

Let me run through some of the problems facing us. The first one involves accountability and the extent to which intervention by an unelected Court is appropriate. If we decide that these families must be given tents, housing, or some other form of shelter or accommodation, that will cost money. People will ask, "Who are the judges to require that? They are not accountable." These kinds of decisions are normally the prerogative of democratically-chosen bodies, whether it be the local council, or the provincial or national government. Exactly which organ of government is responsible is a technical question which depends on our particular Constitutional text and our legislation. In general, however, if these organs of state are not performing their duties properly, then the remedy is to refuse to re-elect them. If the Court gives a bad judgment, however, we are independent, and we cannot be removed. We are not accountable. I do not believe this problem can be resolved in a formal, abstract, and categorical way. When it comes to matters of deep principle, our lack of accountability actually becomes a virtue. We are not running for office, and electoral popularity is of no concern to us. We defend deep core values which are part of world jurisprudence and part of the evolving constitutional traditions of our country. Our lack of accountability in these circumstances actually becomes a "plus." The difficulty, however, is to distinguish between the special cases which deal with these deep values, and the ordinary issues of deciding how to allocate resources among many worthy claimants.

Secondly, the problem of institutional competence arises. What do courts know about housing, about land, about queues? What do judges in general know about the practicalities of low-cost construction, of erecting one's own shelter, of subsidies and sewage? We know about fundamental rights, about constitutional law. We eleven judges can actively handle legal concepts and ideas. Yet we have no special expertise on complex socio-economic matters which frequently have a strong technical dimension requiring experts on the spot to work out appropriate procedures and priorities. Recognition of our limited capacities in this area requires corresponding judicial modesty. We cannot be philosopher kings and queens who go around telling government how to function. Where we do have a voice is when situations of homelessness go to the core of a person's life and dignity. In this respect we may be even better equipped than the experts who are, and correctly so, animated by more bureaucratic and operational considerations. Indeed, the very nature of our decision-making is different to theirs. Decisions made by officials and legislatures have to build in compromise; there is nothing inherently wrong with that—compromise is good in public life. It is right that elected officials be directly responsive to the electorate, but we cannot

and should not be, especially when we are defending fundamental rights. Thus, the compromises they appropriately effect when reconciling different interests are different in nature from the balancing we set out to achieve when harmonizing competing principles.

Thirdly, there are separation of powers considerations. If we insist on money being provided for helping Mrs. Grootboom's community, this requires taking money away from other items in the budget. Is that not what parliament should control? Again, one cannot have a purely formal response. There are many cases in which ordinary decisions of the courts have budgetary implications. If, for example, we insist on legal aid for indigent defendants facing long prison sentences, this costs money. Similarly, we recently had a case dealing with the rights of prisoners to vote. The independent electoral authority said that prisoners could vote in principle, since the legislature had not limited their right, but it could not set up registration centers and polling stations in the prisons—because it would cost too much money to do so. And we held that in fact the right to vote could not be negated merely by a combination of Parliamentary silence, bureaucratic difficulties, and administrative expense. The result was that the money was found, and maybe 30 percent of the prisoners voted. In the Grootboom case, however, we are not just dealing with the right to vote, which is a one-off thing—we are dealing with right of access to housing, which is endless. We have millions of homeless people. When do we intervene, if at all, and force what could be massive redirection of funds on the legislature and the executive? Are social and economic rights just pie in the sky? Or, are the provisions which set them out no more than beautiful words that in reality diminish the prestige of the bill of rights because they are unrealizable and promise something that cannot be achieved?

I do not take that pessimistic view. At the very least, the whole density, tonality, and sense of rightness of the bill of rights, is affected by the inclusion of these rights. Is the Constitution about welfare or is it concerned with freedom? It relates to both. We do not want bread without freedom, nor do we do not want freedom without bread; we want bread and we want freedom. The bill of rights must be constructed around the interpretation of both these dimensions, so that each reinforces rather than undermines the other. As Amartya Sen has pointed out, conditions of freedom in poor countries prevent hunger from turning into famine, because there is public accountability for food distribution. Similarly, countries with a reasonable standard of living for all tend to be supportive of openness and pluralism.

Secondly, these rights serve as immediately defensible negative rights. The state is prohibited from taking away housing or destroying education facilities. There have to be programmes of progressive realization of the promised entitlements. Retrogression is constitutionally unacceptable. That principle is relatively easy for courts to apply. You cannot just

knock down a school or destroy a hospital. We are used to negative restraints on the state.

Thirdly, these rights apply in the overall interpretation and development of the common law, for example, in deciding whether or not a contract violates public policy, as well as generally in the interpretation of statutes. Thus, they suffuse and influence the whole judicial enterprise in all its manifestations, ensuring that the protection of human dignity is always at the center of what courts do.

Fourthly, our Constitution gives our Court the right to declare that the President or Parliament are in dereliction of a constitutional obligation. This implies that even if we do not compel the President to act in a particular way, or order Parliament to pass a particular law, we have the power to declare that they have failed to fulfill their constitutional responsibilities. Then it is up to the political organs to act. It remains to be seen how this provision will be applied, but it has considerable potential for the future.

Fifthly, there is enforcement through monitoring and reporting. The Constitution gives the Human Rights Commission the duty to monitor social and economic rights, and to report annually on its findings. This is common in international instruments of this kind. The monitoring involves both inspection and introspection, and again, it is left to political pressure to ensure compliance with recommendations.

Eventually when Mrs. Grootboom's case is heard in our Court, we will have to decide whether we can grant relief that will impact on the budgets and decision-making of democratically-elected bodies. I will mention the kinds of factors that might be influential.

First, is the state directly implicated in the situation in which the applicants find themselves? If the state itself was directly involved in rendering people homeless, then it might be easier to demand that the state remedy the situation it has caused. If, for example, the state's machinery is used to evict people and destroy their shacks, a case can be made for saying to the state, "Hold on. You cannot do this. Even if you are not intending to promote homelessness as the state, your machinery is being used to diminish enjoyment of social and economic rights." One can think of other areas where the state might be implicated, for example, in the case of prisoners. If the state deprives you of liberty, it must feed you and shelter you. Similarly, people in state hospitals have certain rights to have their needs attended to.

The United Nations committee dealing with social and economic rights refers to a duty of the state to provide a "minimum core" of basic rights for all. Alternatively, there might be a special claim by certain groups that are particularly vulnerable—your classic *Carolene Products* case—where the claimants are part of a discrete and insular minority who are politically powerless and need the protection of the court in order to secure their basic dignity and rights. Next, it might be easier to justify intervention where the invasions of rights touch on race and gender, or where

they affect your right to life, or are so egregious as to precipitate desperation or extreme urgency. It might be that the consequences are so calamitous that any fair-minded person would say, "Give them at least some protection, even if it affects the budget. We cannot live in a society that allows human beings to be treated like that." Finally, one can develop procedural rights and rights to information in creative ways to advance the interests of deprived sections of the community.

One can introduce flexible remedies, as was done in *Brown v. Board of Education*, and has been done in India. We have a power to make just and equitable orders. You give maximum flexibility to the organs concerned in terms of how to comply with an order, but comply they must.

Well, these are our roosters that are crowing, or our eggs that are being hatched. It might be interesting for you to see eventually what emerges from the South African Constitutional Court decision after May 11. Thank you for helping me to think my way into this subject. And, please, please as Americans do not exclude yourself from what is going to be, I think, an extremely important debate for the world and for your country as well.

AN: Justice Sachs, I just want to thank you for that wonderful, nuanced, and very thoughtful presentation of one of the difficult subjects I think courts face. Thank you very much.

**XML and the
Legal Foundations for
Electronic Commerce**

