



Human Rights Lecture, 2006

Judge Albie Sachs



1. *Background*

The South African Human Rights Commission (SAHRC) and the United Nations Office of the High Commission for Human Rights in partnership with the Independent Electoral Commission (IEC), the Commission on Gender Equality (CGE), and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CLR), jointly organised the first Annual Human Rights Lecture.

The lecture, which took place at the Human Rights House, Parktown, Johannesburg, on 8 December 2006, commemorated the 10th anniversary of South Africa's Constitution, and was addressed by the keynote speaker, Justice Albie Sachs. The theme of his address was "Fighting Poverty: A matter of Obligation Not Charity – Celebrating Ten Years of South Africa's Constitution."

2. *Introduction*

The CEO of the Commission, Advocate Tseliso Thipanyane welcomed guests and officials representing Chapter 9 Institutions, United Nations Agencies, diplomatic community, government departments and civil society. He also gave a special recognition to Sachs.

3. *Reflections*

The SAHRC chairperson Jody Kollapen extended an invitation to government and civil society to make use of the Commission's facilities to hold seminars and conferences. He also reminded delegates that December 10 was the International Human Rights Day, and that 1996 marked the 58th anniversary of the United Nations Universal Declaration of Human Rights. He referred to 1948 as the beginning of an era when the family of nations looked ahead to building a world of social justice, free from conflicts and horrors of the Second World War. Citing the achievements of the past 58 years in areas of economic, social, civil and political rights, Kollapen also reflected on how over the years the international community developed treaties,

charters, declarations and other international human rights instruments and protocol, to cover every aspect of life. In this respect, and from the norms and standards perspective, he said remarkable progress had been made.

However, he expressed disappointment about continuing inequalities and skewed power relations that still characterise the world. The rich nations continue to grow wealthier, while poorer and under-developed nations continue to face huge challenges of under-development and lack of resources. He said it was important for South Africans to appreciate this context, and understand that human rights did not mean the same things to everybody.

To those who are resourced and powerful, human rights may represent an important tool for "self-development", whereas for millions who are disadvantaged, human rights may be meaningless with no impact in their lives.

Referring to some African countries, including Rwanda and Darfur, Kollapen said the figure of people who have been displaced as a result of acts of genocide stood at 25 million. A third of this figure which accounts for 8.3 million people cannot be reached for assistance. This is in addition to the global refugee population figure of 11 to 12 million people, aggravated by the impact of HIV and AIDS which accounts for 40 million people infected with the virus worldwide.

With regard to poverty, Kollapen said globally more than 1 billion people still lived below the poverty line of one dollar (\$1) a day, and that 20 000 (what does this figure represents – global or regional?) people died each day of poverty. With these figures, he said, it appeared the promise of Millennium Development Goals would for the majority of the people remain an elusive dream for years to come.

Kollapen said the Human Rights Lecture, earmarked to be an annual event, would help South Africans to create a context within which to reflect profoundly on issues of justice and human rights.

On behalf of all the Chapter 9 Institutions and the Office of the United Nation High

Commission for Human Rights, Kollapen expressed his gratitude to Judge Sachs for agreeing to be the first guest speaker of the inaugural 2006 Human Rights Lecture.

In introducing Sachs, Kollapen reflected on the role Sachs played in the liberation struggle that gave birth to South Africa's new constitutional order. He said as the Constitutional Court judge, Sachs brought passion and vision to his judgments representing the human spirit that went beyond what was expected jurisprudentially.

4. Keynote Address

4.1. Grootboom v State

In his keynote address, Sachs used the landmark Constitutional Court case of *Grootboom* to show, on the one hand, a link between poverty and the denial of economic and social rights, and on the other, the state's responsibility towards ensuring that these rights were provided for in a constitutional democracy. In addition, the judge referred to Constitutional Court judgments of *Hoffman v South African Airways*, and the *Treatment Action Campaign v Minister of Health*, which also dealt with socio-economic rights, equality and poverty.

In introducing the *Grootboom* matter, Sachs said Mrs *Grootboom* and most of the respondents living under deplorable conditions in *Wallacedene*, an informal settlement in the Cape Metropolitan area, were evicted from the low-cost housing they had occupied illegally. About half the population evicted consisted of children who lived in shacks with no water, sewerage or refuse removal services. A local attorney took up the case and approached the high court on behalf of *Grootboom* and Others (respondents). The basis of his defence was that according to the constitution, everyone had the right of access to adequate housing, including *Grootboom*, her children and other evicted members of the community. The constitution holds that the state has a duty to take reasonable legislative

and other measures to progressively realise these rights within its available resources. Specifically, the respondents had applied to the High Court for an order requiring the state to provide them with adequate temporary shelter or housing pending their obtaining permanent accommodation, including basic nutrition, healthcare and social services.

The respondents based their action on two constitutional provisions. Section 26 of the Constitution imposes an obligation upon the State to take reasonable legislative and other measures to ensure the progressive realisation of the right to access to adequate housing within its available resources. Section 28(1)(c) of the Constitution provides that children have the right to shelter.

Sachs said when the matter came before Judge Dennis Davis, the judge had to make a determination whether or not the state had met its constitutional obligations of progressively providing access to adequate housing, within its available resources. Specifically, the judge referred to children, whose rights were adversely affected by the eviction. Davis ruled that as far as the children's rights to shelter were concerned, they were not based on the availability of resources, but were immediate and unbreakable. The judge held that no child should be without shelter. He ordered that the children be immediately provided with shelter at the state's expense. He also ordered that since children could not be separated from their parents, the parents would move in with them.

The state took the case to the Constitutional Court on appeal, which in its turn took into account that the state was often challenged by resource priorities, and how and where it would redirect its expenditure. This, said Sachs, was at the heart of determining the enforcement of economic and social rights in the country. In coming to its decision, the court focused on what was unreasonable as far as the state's obligations were concerned. To that effect, it came to light that the state did not have programmes for poor people with no housing, like Mrs *Grootboom* and other respondents, victims of fire and others who may find themselves in a similar situation.

Sachs said the court had an obligation to take a positive action to meet the needs of those living in conditions of extreme poverty, homelessness or intolerable circumstances. In arriving at this conclusion, the court was not implying the state should provide housing to the Wallacedene community ahead of others who were already on the housing list. It simply requested that the state should consider their economic and social status as they did not even have plots on which to build houses. The judge said the court did not wish to dictate to the state how it should determine its expenditure and priorities. However, it ordered that the state should within a reasonable time establish programmes to ensure that Mrs Grootboom and other members of the Wallacedene community were provided with adequate housing.

4.2. Hoffman v South African Airways

The second case that Sachs dealt with in his address illustrated the importance and relevance of socio-economic rights to matters of poverty as is shown in the case of Hoffman v the South African Airways.

This matter was referred to the Constitutional Court for adjudication. In this case, Hoffman applied for employment to the SAA as a cabin attendant. His application for employment was rejected. The SAA discovered, following a blood test performed during the selection process, that Hoffman was HIV positive. Although the SAA policy did not accept HIV positive individuals for positions as flight crew, Hoffman approached the High Court for relief, directing the SAA to employ him as a cabin attendant. He argued that he had been discriminated against, and that he was still in the early stages of the infection, and that he would be able to carry out tasks required of him by his position as a cabin attendant.

The case went to the Constitutional Court on appeal. The High Court had rejected Hoffman's argument on the grounds that because of the virus, it would not be possible for him to serve in planes that landed in equatorial countries

as it was a requirement for people working in such countries to be injected with yellow fever vaccine.

However, the SAA was prepared to offer him another position, but would not consider him for a position as a cabin attendant. The operators of the airline were concerned how its passengers would react if they were to discover that the airline employed a person who was HIV positive. But Sachs believed the airline's decision was based on irrational prejudice.

The judgment, which was prepared by Sachs, was unanimously supported by the Constitutional Court, and Justice Sandile Ngcobo gave a summary judgment, which in parts read as follows: "*We cannot allow the commercial practices of commercial airlines to dictate what the fundamental rights of South Africa should be. And it is quite clear that Mr. Hoffman would be able to work for several years. His health indicates that it is good enough and he has been denied the right to work by SAA because the public is prejudiced against people like him. It is the duty of the courts in terms of the constitution to protect the people against prejudice and not for SAA to go along with the prejudice and reinforce that prejudice. This is the denial of his right to equality*".

The Constitutional Court ordered that the airline operators employ Hoffman as a steward. After the judgment, Sachs was overcome by deep emotions, primarily because he as the Constitutional Court judge was entrusted with a duty of defending a constitution that protected the fundamental rights of all people.

4.3. Treatment Action Campaign v Minister of Health

Two years after the Grootboom judgment, the Constitutional Court dealt with another matter involving the enforcement of social and economic rights. The case dealt with the provision of the Nevirapine, and the state's failure to make the drug available to prevent mother-to-child transmission to pregnant

women who were HIV positive. The High Court ordered the state's health authorities to make the Nevirapine available to certain women and their babies.

The High Court found that the government had not reasonably addressed the need to reduce the risk of HIV positive mothers transmitting the HIV virus to their babies at birth. The government had acted unreasonably in refusing to make the antiretroviral drug available in the public health sector. The High Court ordered an interim execution pending the state's appeal to the Constitutional Court.

According to Sachs, issues raised by the TAC's were profound. He said while the Ministry of Health could decide which drugs could be used and which could not, the people who were dissatisfied could complain and criticize and use their electoral powers to register their unhappiness. In this respect, the judges cannot say whether they are right or wrong.

However, the court simply ordered the government to take reasonable and pragmatic measures. The law says every person has the right to access to adequate health care. That is an individual right. It is a personal right.

Justice Sachs drew an inference about somebody who was living higher on the mountain. It will be expensive to get water up the mountain. You need a network of pipes and other infrastructure to provide water to those living on the mountain. In this case, does it mean one individual can take up the matter in court and make a case because water is not available to all living there?

These are our realities. Choices have to be made. In protecting the rights of the poor people, there are things that have to be done pragmatically.

Sachs said if the government's programmes were to totally disintegrate, the function of the judges would still not be about water supplies or educational expenditure. It would have to continue to be about the protection of fundamental rights.

Sachs said the issue that has been

threatening to come to court was about the right to education. The court can intervene on matters that involve the exclusion of a little child from a particular school because they do not speak the language or because of the colour of their skin. It would be dangerous if the courts made decisions on these matters purely on the basis of availability of resources. If this were to happen, the courts would be embroiled in local politics, and the principle of separation of powers between the executive and legislative would be lost.

When judges deal with areas of intense interest like human dignity, the right to dignity, the judges are fearless. But they do not disperse the jurisprudence capacity by picking each and every case. The court can deal with matters like statutory rights, right to due procedures and the right to be heard, but not question of socio economic priorities.

Judge Arthur Chakalson gave a summary judgment. He said that when dealing with the argument about the judges' stand on the prescription of drugs, the constitution gives the judiciary the powers and responsibility to enforce fundamental rights. The duty on the state is to take reasonable measures to satisfy the constitution. The judicial function in the constitution is not something that the judges are claiming. This is part of the separation of powers entrusted specifically to a particular organ of government to ensure that these rights are fulfilled.

The courts have to decide what is reasonable. The Nevirapine was offered for free, although there were implications. There were two dedicated sites in each of the nine provinces that were agreed upon to roll out the drug provision.

In the private sector, one could buy drugs over the counter, if one had a prescription. In public sector doctors were clamouring for it, and believed they could manage the roll-out. The doctors in public sector wanted to help mothers to give birth to their children with the hope that they could reduce by at least 50% the risk of transmitting the virus to children.

In terms of the argument presented by the

TAC attorney, the state could not run a health system with public expenditure, but leave out the poor. The State has to provide for the needs of the most desperate people, and anybody who feels the need for the judicial leg-up may approach the courts for judicial remedy.

The application by the government for leave to appeal was accordingly dismissed by the Constitutional Court.

5. Commentary

Sachs gave a brief commentary on some of the issues that emerged from the discussions.

5.1. Freedom of movement

On the freedom of movement, Sachs referred to the Port Elizabeth Municipality citing an ejection order against squatters who resided next to an up-market area. His view was that there was a need to build up strong economies in rural areas.

Although there may be no right answers, with conflicting rights in some instances, the courts always try their best. In some cases mediation should be considered as the best route to follow. Parties in a dispute should be encouraged to communicate with each other in order to reach a solution.

5.2 Basic Income Grant

A basic Income Grant is a political question. This is not the kind of question to be brought before the courts, but one needs to find a legal way of bringing it before the country's courts. The function of the courts in a democratic South Africa is to make democracy to succeed by interpreting the law.

5.3. Same-Sex Marriage

There should be no discrimination on the basis of sexual orientation. The constitution guarantees gender equality. The duty of the

courts is to give effect to the constitution. The constitution should not undermine democracy and the peoples' right.

5.4. Crime

There is nothing in the constitution that prohibits vigorous actions when dealing with crime. However, we do not need torture, and the constitution prohibits detention without trial. The state will have no moral power if it is an active violator of human rights. Through good policing methods, good intelligence follow-up and good evidence, there should neither be torture nor abuse when dealing with offenders. Some people find it easy to blame the constitution for all the ills of society. Due to the escalating rate of crime, there is always a temptation to apportion this to the constitution.

5.5. Appointment and accountability of judges

Sachs said judges need to be accountable. Judges are also accountable to the legal community about the way they write judgments. Any kind of restrictions should be informed by the constitution.

5.6. Accountability of the private sector

The South African Bill of Rights is applicable to all sectors of our society, especially as it relates to the question of gender and race discrimination.

6. Conclusion

Dr Sihaka Tshemo of the Office of the United Nations High Commission for Human Rights gave concluding remarks. She commended the people of South Africa for their achievements, and expressed gratitude about the role civil society played in addressing the question of poverty reduction. She said the UNHCHR engagement at the regional level

(SADC), working to ensure the realisation of the Millennium Goals Development, should be applauded.

In so far as issues of discrimination, accountability, transparency, corruption, were concerned, Tshemo said these needed to be tackled with vigour and commitment.

The empowerment of the poor and the most vulnerable people, particular women, should top the agenda of governments. She was also critical of discrimination that limited the development of women, and urged the

SADC to practice good governance, and seriously tackle corruption in the region. The rule of law was something she felt needed urgent attention, and called the international community to meet its commitment of supporting developing countries.

During the 2005 World Summit, global leaders recognised that development, peace, poverty alleviation, security and human rights were important elements in the development of all societies. She said the project of making poverty history would remain in serious doubt if poverty was not tackled, and seen as a violation of human rights.



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