

Interview with Albie Sachs on 1 May '91
Re: Socio-Economic Rights - methods of enforcement

The question of equal rights which is a first generation right is a fundamental principle. There are no qualifications and no compromise on that. The question of second generation rights is a question of mixed principles and strategy. And we can be flexible in our strategy provided that we find some form of acknowledging that second generation rights ^{are} ~~is~~ just as important as first generation rights. They don't qualify the first generation rights, those rights are unqualified. Eg Freedom of Speech, Freedom of Political Action, Equality - these are not conditional upon the country being rich or the question of hunger being satisfied. We don't oppose ^{freedom from} hunger to freedom. We want both. That is a very important qualifying point to make. A lot of opposition to second generation rights says that it dilutes first generation rights. You use national campaigns against hunger and so on to oppress freedom and say that it is justified in the interests of the masses. You can repress freedom to get development - that is not our position. It is not in the Bill of Rights. A Bill of Rights is very clear that first generation rights stands on their own as values that you fight for. We also want second generation rights, also values that are important on their own. The mere fact that there is freedom of speech for example, and freedom of political action and fundamental equal rights doesn't mean that the question of hunger, the question of housing, and of health is not important. It is obviously of fundamental importance and the major point to make in a country like South Africa where the lack of access to facilities and opportunities is associated with race, then it ceases to be simply a second generation right and becomes and it overlaps a

lot with the first generation right - the right to equality.

Q: DOES THIS MEAN THAT SECOND GENERATION RIGHTS, IN A SENSE, WOULD GIVE CONTENT TO FIRST GENERATION RIGHTS?

I don't think that is the best way of putting it. They are rights in themselves and they are equally important. We want freedom even if we are hungry - and freedom has its own content. It is not given content by being given food. But we also want food. We want everybody to have food and where the two overlap a lot in South African conditions, it's not just a question of rich and poor, it's the whole institutionalised inequality of apartheid which actually created poverty, created division, so in that sense it comes closer to the first generation right, the rights of dignity, personality. If we ensure, because it is not whites who are starving or living in shacks, or going without electricity and water, it is blacks and it is because of apartheid. So in that sense fighting for second generation rights in South Africa is part and parcel of, an extension of first generation rights - rights of personality, rights of the person and freedoms and which is also crucial for the purpose of building a nation - because you can't have a nation if one section of the nation lives in luxury and another section lives in misery and squalor. You can never build a nation, particularly if the two sections are divided on grounds of ethnicity, background and so on. These are introductory points. Just to summarise then, the first point is that by fighting for second generation rights, we in no way diminish our regard for and passion for first generation rights. We fight with equal passion for both and we should at no stage allow the existence of second

generation rights or the need to create second generation rights override, undermine or dilute first generation rights. Conversely the mere fact that first generation rights exist should never be used to dilute, override or undermine the need to fight for second generation rights. That's a preliminary point. The second preliminary point is that in South African conditions where economic inequality is being closely associated with apartheid - institutionalised racism, the fight for second generation rights is part and parcel of the overall anti-apartheid struggle. It is not simply a campaign against poverty. It is the foundation for building a nation. It is the foundation for extending the principle of equal rights to everybody irrespective of race. So there is a very big overlap in South African conditions between first and second generation rights and the way we have put our second generation rights in our draft Bill of Rights is to make them essentially rights of survival and dignity. We focussed on that. They are not rights of riches, they are not pure economic rights in that sense. They are rights of minimum human dignity - minimum human dignity rights. That is the second preliminary point. The real question then is, do they belong in a constitution or should they simply be part of a *political* programme. If we succeed in getting them in a constitution, then this will be the first constitution that will be so detailed and so precise in this respect where they are not simply *directives* or appeals and it will be a tremendous achievement. At the same time I would say we have to be modest about this and we have to listen to other arguments because it's not plain sailing that these rights should be in the constitution

- should take the constitutional form. What we have to be very careful of is to ensure that the constitution does not block them, does not exclude them. So that's the very first point and the constitution must be such so as not directly or indirectly to prevent the achievement of second generation rights. That's a major task and this means that in particular the question of property rights has to be looked at with great care and in our view property rights are not really first generation rights, they belong as part and parcel of the type of package of second generation rights. We do, being realistic and practical acknowledge that some form of compensation has to be given for this purpose in relation to existing property rights. That's a pragmatic factor, rather than a human right factor. When one's concerned, one can distinguish between two types of property. The one is property that is your little piece of space where you are ^{able} invisible. That is a human right, a little bit of area you have, maybe your garden, maybe your little plot of land where you should have certain fundamental rights and now that the State nor critical organisations, nor local authorities should have the right to budge you from that and to violate those rights that you might have - without some form of adequate compensation in the public interest. But there is another kind of property that has nothing to do with these fundamental human rights to have a little piece of space that is your own and for yourself and your family. And that is property as a means of making a profit, and that would include stocks and shares and some property interests. Now in the case of these property interests, it is not a question of fundamental human rights. One can say there is a fundamental

human right not to be deprived of your assets without due process of law. In other words people can't just come and help themselves. That's a human right not to be pushed out of your possessions without due process of law. The question of compensation, however, becomes a human right if it's designed to combat thuggery, war-lordism, appropriation. But if the taking is in the public interests, in other words certain human rights of many others, then it ceases to be a purely human right for instance - then you are weighing up the public interest as against the personal interest. The way that is done is through heavy ^{ing} compensation. You can dislodge people from their possessions, but in many countries you get compensation. And then the question is how to organise reasonable compensation. And that we have to be attentive to and that's the subject of another enquiry. However, as far as the rest is concerned, one doesn't want for example the right to own property to be greater than the right of people to have a home, to have a household somewhere and one finds in India the Supreme Court held that the right to life is superior to the right to property when it came to moving the local council moving the people who were sleeping on pavements off the pavements, unless it couldn't be done by the local authority unless alternative accommodation was provided. Such a kind of a thing in a constitutional framework. Anyway this is all preliminary to saying that the whole question of second generation rights are considered both defensively and affirmatively. Defensively in the sense that there must be nothing in a constitution in first generation rights or elsewhere which would actually prevent the achievement

of second generation rights. This does not mean that we want to override the fundamental freedoms. You don't feel that you achieved second generation rights by overriding first generation rights. It does mean that when it comes to economic implications to first generation rights, you have to be aware and harmonise them with second generation rights. So then that raises the question of **enforceability**. Now enforceability can take many forms. The highest form in legal terms is the right to appeal to court or some other kind of tribunal. Perhaps the most developed form of a legal right is a claim.

It's not the only one. If a claim can be brought before a court then it's called justiciable. And obviously one aims for justiciability. Now in the case of enforceability even in terms of the court justiciability, **there are six ways in** which in fact the courts can be brought in directly in relation to second generation rights. **Firstly** the second generation rights can be used as principles of interpretation.

Q: But just before we get to that, does that mean that your second generation right is then part of your entire Bill of Rights?

It could be yes. It could be in the Bill of Rights and it could be for example as in Namibia directives is state policy or in India or in Ireland and they become aids to interpretation. The statutes are ambiguous - then they can be interpreted. They must be interpreted in the way that's consistent with these directives as state policy. So that's number 1.

Q: Just on this issue of ambiguity. Wouldn't there be a greater onus on the sovereign to make laws so that the effect would

correspond with either the directives or the so that
 the courts would have a bigger scope ^{of interp.} or ^{are at} we coming to that?

Yes, **secondly** the principles can be used to establish negative rights, that is to prevent people from doing anything which undermines those rights. You can't destroy housing without providing alternative accommodation. You can't increase unemployment without finding alternative forms of employment. So these are negative rights. **Thirdly**, in terms of judicial review, these directives of state policy could be relevant for establishing reasonableness of administrative acts and of subordinate legislation. **Fourthly**, bodies can be established to supervise, investigate and report to parliament and to regional and local authorities on the progress in achieving these rights. And if these bodies fail to function, or function incorrectly, the courts can supervise that. **Fifthly**, the legislature can be held to be in omission of its responsibilities if it fails to legislate for rights that are spelt out in the constitution. For example in Portugal the constitution - it's important to give the example - provided for local referenda to be held and there was no legislation. The case was referred to the constitutional court and the constitutional court gave an advisory opinion to the effect that the legislature at parliament was in omission and this advisory opinion had a powerful public opinion effect and the legislature acted **Finally**, the right to information (that is no. 6) can be given a special strength in relation to these areas so that all public and private bodies can be required to give the information necessary for tackling the question of second generation rights.

Now the last section of this paper which I would make the first section, and just by the way I'd be very happy to collaborate on the preparation of the paper. The whole question of equality in South Africa in a constitutional framework has to be looked at in four modes. So this is a separate part. The fundamental is the principle of equal rights and equal protection. This doesn't mean that existing property is shared out. It does mean that in one's relationship with the public authorities at any level, everybody has to be treated equally. Whether it's accountability on the one hand or whether it's benefits on the other, so equal protection means that benefits must be distributed on an equal basis. And at the moment they're not, as I keep saying there is massive affirmative action at the moment in favour of the whites. Whites get five times as much on schooling as blacks. Five times as much on health as blacks - that has to be ended. There has to be an achievement of equal expenditure. It is not to say whites don't get access to schooling and health, they do but they don't get on a privileged basis. They get on an equal basis with everybody else and the same would apply to farming subsidies and the same would apply to things like drainage, sewerage, street life in tarred roads and all the facilities of a decent modern life. And that's possibly at this stage the most important theme for guaranteeing rights for everybody. And that comes as much under first generation rights as second rights and we have to pitch very strongly on that. That's the principle of equal protection. When the second principle of equal opportunity and equal opportunity brings in affirmative action and positive action - that is where people have been by age^{old} discrimination
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have been deprived of access to skills to knowledge the right to work and to land, a special effort is made to get people the qualifications and the tools and the means of earning a decent living and a dignified living. It is not saying that unqualified people should get jobs and positions simply because they're black or white or whatever. It is not a new form of job reservation. It's qualifying people who have been denied access to qualifications. It's giving them a special boost, a special chance to make up for the disqualifications imposed by apartheid in the past. So that's the second principle. The **third** principle is the principle of second and third generation rights in the constitution and in a way they have the advantage of focussing on a purely non-racial criteria - a criteria of fundamental human dignity. These would be the criteria, if you like, of a minimum criteria of a welfare state. It is not saying that the state must take over all economic activity. It's not saying that the market is abolished. It doesn't deal with the question of nationalisation, it simply says that whatever social economic policies are covered in the country, any regime or government - capitalist, socialist, mixed, any new kind of "ism" that might be linked to it is obliged to attend to the fundamental survival and dignity needs of the population and that's where these rights come in. And I think it's important to see them in the context of equal protection and affirmative action. It's part of a general strategic advance that is law governed, that is principled and that's consistent with university accepted human rights values. The **fourth** means of bringing equality is in relation to the allocation of resources

from the rich areas to the poorer areas of South Africa. That brings in the question of redirection of resources at a regional level. And in the past the poor regions have contributed to the wealth of the rich regions, that exploited^{orted} labour at the price of their own development and some kind of recompense has to be paid. But more important than that to build a nation we have to establish some form of equalisation of schooling, health, economical access to economic^o opportunities and general infrastructure. But that's done through another mechanism, that's done through the general ^{fiscal} ~~physical~~ policy and that depends upon policies of regional development. So to summarise there are four major means of achieving in a constitutional way redistribution in South Africa, none of which involves the state taking over the means of production, but all of which give an important function to the public authorities at national, regional and local levels. The first is equal protection and the equal distribution of public resources. The second is affirmative and positive action and to provide equal opportunity. The third is guaranteeing a specific social economic - that is second third generation rights. And the fourth is redistribution on a territorial basis through the regions and regional development and there comrades and friends you have it.

Q: I don't have basic questions. It has more to do with a criticism that I have heard concerning positive action where it is said that your target area of positive action would necessarily be a small one where only those lucky enough to be - not caught up in the

system by their own, but to be allowed in who have those national special skills - those in effect are the people that will be definitely that your majority who possibly not even get into a school. He would be excluded. You cannot get into a school because he simply has to work.

So that's the danger of looking at affirmative action in isolation on its own. If you look at in the context of equal protection and second generation rights and territorial redistribution, then it deals a very specific problem without diminishing the rights of the others. I think we have to advance *particularly the professional class shouldn't* on all fronts and there is no reason why the *advance, in fact it is going* to be vital because we have to establish middle and senior level and managers, administrators, professionals, highly qualified people drawn from all sectors of South African society. Otherwise we are going to have white domination continue forever and we going to need a very special effort to do that. So that's not to speak against affirmative and positive action, it's to say it's not enough in itself.

Q: Now obviously, just to throw another common criticism is, that you would need money for these if you would want to have the redistribution - if you want to reallocate - let me just have a look here. Everyone to have benefits distributed on an equal basis. You are going to have some financial *ing* package of some sort. It would have to come from somewhere. And here in the *JWC* bulletin - this might be a general perception among business men. This person of Shell said that rumours

suggested that for a short term housing, as an eg now,
 may be higher on the future government priority list.

They will not support political programmes which is not economically feasible.

Now it's an appropriate observation and we musn't run away from it. If you look at these four forms of redistribution, none of them are conditional on there being an increase in the total wealth of the country. Obviously we would like there to be an increase in the total wealth. Obviously we feel that the general ^{ising} raising of the living conditions of the people out there, education, will produce greater productivity and greater wealth for everybody and a greater market for the goods. But we can't make these rights conditional on growth. There might or might not be growth. ^{We want} ~~Not~~ growth as an end in itself. If you look at equal protection, equal protection doesn't say everybody should live in an equally good house. It simply says all the public funding that goes on housing shall be done on an equal basis, so it means that the amount of money being spent is the same, but it's being equally rather than unequally. If you look at the question of affirmative action, it's not an enormously expensive thing in itself, it's the question of qualifying people and it's the kind of thing that because it qualifies people, it increases their productivity and should pay for itself in ^a ~~the~~ very very short time. And that's not the thing that requires the enormous expenditure such as decent houses and ~~so on~~ for everybody. If you look at the third category, namely second generation rights, this is the one that could involve massive expenditure and what we have been careful to do is to have two qualifying factors; first of all that the programme of guaranteeing his

rights is conditional on the availability of resources and that's a phrase that we took from the 1966 United Nations Covenant and dealing with exactly this area. Secondly, by establishing the concept of minimum and expanding floor of minimum rights and this is the heart of the whole issue, we are making the expenditure proportional to the available resources and ensuring that it's done in a planned way within those resources and it can be from the wealthy areas spreading progressively to the poorer areas and then that minimum platform can *expand*.

You will notice it does not say that houses shall be built for everybody. We felt that is unfeasible at this stage. It does not say a job shall be provided for everybody. It doesn't guarantee a right to work. It simply gives collateral rights in relation to health, shelter and housing without guaranteeing a house which would be too ~~exp~~ensive. The fact that we can't provide a house for everybody doesn't mean that we can't provide water for everybody, doesn't mean that we can't provide access to energy for everybody. And that is what the strategy is really based on. The last of the categories that I mentioned, namely to equal distribution also presupposes that there is a given *pool* of resources and it simply directs that for eg new road building programmes should be directed towards the extremely poor and under-developed parts of the country and not creating more flyovers and express ways in the developed areas of the country.

Q: Where does second generation rights belong?

I would say there are ~~three~~ ^{four} possible strategies. What they all have in common is that there should be nothing in the

constitution and actually inhibits the achievement of second/third generation rights. The first strategy, the one we've gone for is to actually spell out and develop a mechanism based on minimum rights. It really depends upon legislative enforcement and a system of rapporteurs - a follow-up. A second strategy would be to simply to have directive of state policy. The second would be directives of state policy coupled with the guarantees of a minimum rights and then which would be inflexible and then we would have a schedule annexed which would actually spell out specific areas such as light, water, rubbish collection, minimum calories and so on. That would have the advantage of making the constitution less cluttered and the things would be out of date - the constitution will not be out of date so quickly. That's ^athe suggestion that's been made that we might look into and then being in the schedule it would have - being annexed to the constitution - give it considerable weight but these areas could be amended in a way that's more flexible and in the constitution it would be very difficult. So that's the second possibility. The third possibility is the Namibian one of simply having directives of state policy and then that would be quite important in ensuring that nothing else in the constitution could be used to block second generation rights. And it's quite a respectable position. I don't think we should involve it as a total failure and the fourth is to say that none of this should go into the constitution at all and that these are issues best left to the political struggle and for the parties to fight over. And we just leave it to the legislature to decide.

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