



INCLUSIVE SOCIETY INSTITUTE

Op-Ed

The Progressive Realisation of Socio-economic Rights in South Africa: Albie Sachs' Pioneering Role *By Nicola Jo Bergsteedt*

South Africa's path to democracy and inclusivity has been characterised by monumental struggles, heroic sacrifices, and visionary leaders who have profoundly shaped the nation's future. Among these towering figures, former South African Constitutional Court Judge Justice Albie Sachs stands out as a stalwart champion of human rights and a driving force behind the progressive realisation of socio-economic rights in post-apartheid South Africa.

In a recent illuminating conversation with the Inclusive Society Institute, Justice Sachs shared insights into his instrumental role in shaping South Africa's constitutional framework, with a particular focus on socio-economic rights. His reflections shed light on pivotal moments, impassioned debates, and his profound contributions to the formulation, interpretation, and enforcement of these fundamental rights.

Justice Sachs began by addressing the initial scepticism surrounding socio-economic rights during the constitutional negotiations in the early 90s. He stressed their critical importance as a counterbalance to civil and political rights, which were essential but insufficient to heal the wounds of apartheid and build a just society. He recognised that for South Africa's new Constitution to be genuinely emancipatory, it needed to encompass not only traditional rights but also social and economic rights.

It was here that Justice Sachs introduced the concept of the "emancipatory vision" of these rights. He emphasised that these rights were not mere legal abstractions but were deeply rooted in the quest for justice and equality. Justice Sachs introduced a conceptual framework that acknowledged the evolution of human rights through three generations: from civil and political rights to social and economic rights and ultimately to environmental and development rights. This innovative framework laid the foundation for a more comprehensive understanding of human rights in the South African context, grounding them in the country's unique history and challenges.

However, one of the most significant challenges during the constitutional negotiations was how to include and enforce socio-economic rights effectively. Justice Sachs explained that the international context played a substantial role, with Western nations being hesitant to fully embrace these rights. This global division was mirrored in South Africa's own constitutional debates.

Justice Sachs and his fellow founders of the South African Constitution deftly navigated these challenges. They introduced the concept of "progressive realisation" – an obligation on the state to take reasonable measures within available resources to realise socio-economic rights. This nuanced approach allowed for flexibility and pragmatism while ensuring that the state remained accountable for improving the living conditions of its citizens.

To illustrate the complex nature of enforcing socio-economic rights, Justice Sachs shared a poignant case involving a man, Mr Subramani, who was denied life-saving medical treatment for renal failure as he was not a healthy enough candidate for a transplant, and due to resource constraints. Mr Subramani took the matter to the constitutional court and the judges ruled that he was not eligible to be pushed up the transplant list. This example vividly underscored the challenges of providing healthcare as a social and economic right in a resource-constrained environment. It showcased the real-life consequences of decisions related to socio-economic rights and the vital role of the judiciary in upholding these rights. Sachs stated: "The rights in the constitution have a hollow room if there aren't the resources available for fulfilling them, and if compassion and resources were equal, cases like this would be easily resolved"

Another landmark case mentioned was *The Government of the Republic of South Africa v. Grootboom*, a case that holds a pivotal position in the realm of international jurisprudence. It represents a groundbreaking moment in legal history, as it marked the inaugural instance in which a constitutional court upheld the constitutionality of a socio-economic right. In short, *Grootboom* and the other respondents were rendered homeless as a result of their eviction from their informal homes situated on private land earmarked for formal low-cost housing. The Court concluded that the national housing program did not live up to the government's obligations under the Constitution because it did not provide relief for those in situations of desperate need.

It is abundantly clear that the conceptualisation of socio-economic rights is deeply intertwined with South Africa's historical narrative. These rights are not just lofty ideals but a conscious effort to rectify the immeasurable injustices inflicted during the apartheid era. The struggle against apartheid was not solely about political liberation; it was equally about addressing the economic and social disparities that had plagued the nation for generations.

Socio-economic rights, therefore, stand as a testament to the nation's commitment to heal the wounds of the past and build a more equitable future. They recognise that true freedom cannot be attained when a significant portion of the population lacks access to the basic necessities of life. These rights signify a transformative vision for South Africa, where every citizen has a fair opportunity to thrive, irrespective of their racial or socio-economic background.

While the journey to full realisation remains fraught with challenges, socio-economic rights represent an enduring commitment to building a just society where the dignity and well-being of all citizens are paramount. They symbolise a profound shift from the dark days of apartheid to a brighter, more inclusive future.

Justice Sachs' role in shaping South Africa's approach to socio-economic rights enforcement underscores his unwavering dedication to social justice and human rights. He emphasised the necessity of reasonableness as a guiding principle for state action, acknowledging that courts should not micromanage complex policy decisions but should hold the state accountable for reasonable and justifiable measures. His visionary ideas and pragmatic approach contributed to the nation's unique constitutional framework that balances the rights of citizens with the realities of resource constraints.

Justice Sachs' legacy serves as a powerful reminder of the ongoing struggle for justice, equality, and human rights in South Africa and beyond. His life's work embodies the enduring spirit of those who fought for freedom and equality during the darkest days of apartheid. His contributions have not only transformed South Africa's legal landscape but also left an indelible mark on the global human rights movement.

As we reflect on Justice Albie Sachs' remarkable journey and his indomitable commitment to socio-economic rights, we are reminded that the pursuit of justice is a continuous endeavour. It is a call to action for all nations, urging them to uphold the rights and dignity of every citizen, irrespective of their circumstances. In Justice Sachs' words, "Reasonableness is the heartbeat of justice, and justice is the lifeblood of the Constitution." In honouring his legacy, we must continue to champion socio-economic rights as an essential pillar of a just and inclusive society, striving to make the vision he so passionately articulated a reality for all.

The Inclusive Society Institute is an independent Non-Profit institution which has as its objective the promotion of a more inclusive, just and equitable South African society. This article draws on the Institute's Constitutional Insights: A series of Talks with Judge Albie Sachs. The series is being promoted in collaboration with the Daily Maverick. Nicola Jo Bergsteedt is a Researcher at the Inclusive Society Institute.