

**Enforcement of Social and Economic Rights
Justice Albie Sachs**

Speaker: Justice Albie Sachs

Chair: Professor Christine Chinkin, Centre for the Study of Human Rights

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Christine Chinkin

Good evening. I think we'll start the evening's events.

Good evening to you all and welcome to the London School of Economics. I'm Christine Chinkin and I'm Professor of International Law at the London School of Economics and basically it's my very great privilege and pleasure to be chairing tonight's lecture.

The lecture is part of the Public Outreach Series of the Centre for the Study of Human Rights here at the LSE and the Centre also, of course, is delighted to welcome you all here.

It might perhaps be surprising to some people to find a lecture under the auspices of the Centre for the Study of Human Rights, which is on the judicial enforcement of economic and social rights. I think that there still exists for many people a conviction that the real human rights are the civil and political rights, the rights that govern the relationship between the individual and the state which relate to such issues as the right to liberty, the right to be free from torture, the right to assembly, the right to free expression and so on; and that some how economic and social rights, while they are clearly a function of government, are rather issues of economic welfare, of social development, of people's needs rather than issues of rights and entitlements.

But I think it's also very important to remember that economic and social rights have been part of the international human rights category since the very beginning, since 1948 and the Universal Declaration of Human Rights. I think that Article 25, which is the sort of the basic assertion of economic and social rights is worth repeating and worth remembering as it's one of the great international statement of human dignity. Article 25 says everyone has the right to a standard of living adequate for the health and well-being of himself and his family including food, clothing, housing, medical care, necessary social services and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. Nevertheless, despite the strong and initial assertion of the importance of economic and social rights the argument still tends to persist that in some way they are non-justiciable, that it's not a function of courts to determine when governments are complying with these economic and social rights, this is the function of the Executive and that in some sense courts are not capable of adjudicating on economic and social rights.

I think in the last ten years we've some quite considerable challenge to this undermining of the importance of economic and social rights and not least this challenge is coming from a number of decisions from the Constitutional Court of South Africa. The post-apartheid state in South Africa is expressly based upon the values of human dignity, achievement of equality, the advancement of human rights and freedoms. Exceptionally it's constitution provides full constitutional guarantee and protection of economic social rights, again such as the right of access to health care services, food and water and social security. The practical application of such rights and the role of the judiciary in upholding those rights has now lead to a small, but growing quite quickly group of cases <??> prudence from the South African court relating to their implementation. For example <??> case which deals with the issue of essentially evictions, thousands of people living in inadequate homing conditions. More

recently the case that concerns the government's failure to provide comprehensive programmes to prevent mother to child transmission of HIV AIDS. But it's obviously completely wrong that I should be talking about the <??> prudence of the South African courts and economic social rights, although my students will know this is something I tend to go on about. Quite obviously our speaker tonight is very much better qualified to and in fact I think the best qualified person we could have to talk about the enforcement by judges of economic and social rights.

Judge Albie Sachs is truly a extraordinary person. He started his legal practice as an advocate at the Cape Town bar in 1957, worked primarily in the civil rights sphere until he himself was twice detained by the South African Security Police without trial.

Nineteen sixty six he went into exile in this country, completed a PhD at the University of Sussex and taught at the Law Faculty at the University of Southampton; and I can talk from personal experience as to the great both affection and very real awe that is still felt by colleagues at the University of Southampton.

He was the first Nuffield Fellow Socio-legal Studies at Bedford College, London and at Walsham College, Cambridge. Nineteen seventy seven he took up a position as a Professor of Law in Mozambique and from 1983 onwards he served as Director of Research in the Ministry of Justice. After nearly being killed by a car bomb in 1988 he returned then to England.

He's the founding Director of the South African Constitutional Studies Centre based initially at the Institute of Commonwealth Studies at the University of London and from 1992 at the University of Western Cape.

Justice Sachs is also honorary Professor in the Law Faculty at the University of Cape Town. He took an active part in the negotiations for a new Constitution for South Africa as a member of the Constitutional Committee of the ANC and of the National Executive of that organisation. He is currently, and very appropriately, a Justice of the South African Constitutional Court.

Alongside these activities he's also found time to write major works on issues of human rights, gender rights, the environment and culture. He is present in the country as a British Academy visiting lecturer and we are more than delighted to welcome him to the LSE to talk to us about the judicial enforcement of economic and social rights. Justice Sachs.

Albie Sachs

Before I begin my lecture I'd like to explain to you why two students in the Anthropology Department of the University of Berkley as I was about to give a lecture came up and to applause from the fellow students gave me a each a pot plant. It's connected with LSE.

LSE was extremely important in the imagination of students at the University of Cape Town in the 1950s. Professor Jack Simons, one of the great teacher/activists of the 20th Century, had been here in the 1930s, had studied under <Malanovski> <Laskey> during a very ebullient period in the history of this university and he was a great teacher, first University of Cape Town then in Zambia in exile and finally at the camps of the ANC guerrillas in Angola. Young people who had given up their studies, left the country to go out to fight for freedom and who'd learnt that unless you know what the freedom is that you're fighting, merely to have guns in your hands can be very dangerous and Jack Simons was the person who taught them the art of debate and questioning from a humanist perspective, something which he'd learnt here at the LSE; and so when I came out of hospital after the bomb and I'd received some invitations to speak at different places I chose the LSE as my first place of contact with an English intellectual audience – I'm not sure if it was this room – and when I

wrote the story up afterwards in the book that became the *Soft Vengeance of the Freedom Fighter* which the students, happily or sadly for them, had prescribed as a text book in a topic known as the Anthropology of the Body. They read a passage about my reintroduction to intellectual life and it opens with a comment, "Why is it that the English intelligencia enjoy drab surroundings?"

In Mozambique, even at the height of periods of hunger if anybody spoke at any gathering anywhere there would at least be a <??> with a pot plant in it; and the students bought me two pot plants to make sure that I couldn't say the same of Berkley. I'm happy to see a lovely bunch of flowers on the platform today.

Mrs <??> is becoming famous even although many people outside South Africa, like the Chair, have difficulty pronouncing her name.

Christine Chinkin

I realise that.

Albie Sachs

She and her two children and a sister and her three children couldn't bare another rainy season in Cape Town, living in a shack, knowing that the area would be inundated, the shack would leak and the minute they went outside they'd be walking in pools of water for weeks and months on end. About 500 of them decided to move to a hillside nearby where at least there was drainage and they took the pieces that made up the shacks with them, re-erected them on the hillside only to discover that that area had been set aside by the local authority for low cost housing.

Negotiations between them and the local authority proceeded for a long time, they said, "Give us alternative land, we don't mind where we go, we just want to be in a dry place." and the local authority said "We have no more land. All the land we have has been set aside for people like yourselves in an orderly way to get access to local cost housing." Eventually they were evicted, far more roughly than the occasion called for, most of their materials being destroyed. They ended up on a sports field – we call it a sports field, it's just a piece of flat land with maybe a goal post at either end – and pieces of plastic sheeting to protect them against the rain.

A local attorney, solicitor, said "Enough is enough. Our Constitution says that everybody has the right of access to adequate housing; you are being denied that right. Let's go to court." and they went to the Cape High Court which provided for some interim relief so that the questions of principle could be considered without the pressure of following the weather reports.

Justice Dennis Davis who gave the decision for himself and a fellow judge said that the Constitution states that everyone has the right of access to adequate housing but it goes on to state that the state shall take reasonable legislative and other measures progressively to realise that right within it's available resources and the evidence showed that by then the state had provided something like 700,000 brick houses on land with drainage, with electricity and water to people who had moved out of shacks, who paid nothing, who became the owners, about to build on and eventually to sell that land; and he said the state is progressively realising the right within its available resources. But, he said, further down in the Constitution is a provision which says every child has the right to shelter and that provision is not qualified by progressive realisation within available means, it's an immediately enforceable right; and he said we have several hundred children and I am ordering that they be given shelter by the state. Shelter might be something less than adequate housing, but at least it's protection from the elements; and since children can't be separated from the parents the parents must go in as well. The state took that case on

appeal to the Constitutional Court. This was our first – I might call it full frontal examination of the enforcement of social and economic rights.

Let me give you something of the background. In the middle of the 1980s when Mandela was still in prison many of us were in exile, a group of black students at the University of Durban set up an anti Bill of Rights committee, you heard me, an anti Bill of Rights committee. They saw a Bill of Rights as a Bill of Whites. The object of a Bill of Rights as they understood it was to limit a future government in favour of the status quo to protect property and existing rights against any interference by the future democratically elected parliament; and many people in South Africa were in fact arguing that we need a Bill of Rights and we should put it in place now so that when change comes about it won't be too disruptive to our lives. For people supporting freedom to establish an anti Bill of Rights committee, it just couldn't be, but how to respond; and so I was invited by the Constitutional Committee of the ANC to reply and I said we must set up an anti anti Bill of Rights committee. If you accept that a Bill of Rights is simply there to impose restrictions on the democratically elected government then your fears are right. In South Africa the whites, by law, owned 87% of the surface area of the country, in practice probably 95% of productive capital. To freeze the status quo would be to constitutionalise apartheid. To remove the enforcement of apartheid from racially discriminatory measures imposed by the government into racially discriminatory practices maintained in the private sphere and guaranteed by the Constitution.

I argued then that a Bill of Rights needn't be limited to a negative property and position protecting role and I introduced the notion of three generations of human rights. The first generation, the classic rights associated with the French and American revolutions; the basic civil and political rights; the fundamental freedoms. The second generation of rights with diverse inputs from Bismarck in Germany, the Russian Revolution, the welfare states of Scandinavia, post World War II Britain with LSE playing a very pronounced role in that particular area, the social and economic rights; and then the third generation of rights, the phrase coined by a Czech working at the United Nations in the 1970s who wanted to put environmental rights on the map and he couldn't slot them in either to the first generation or the second generation, so the only way to include them was invent a third generation and to even start speaking about generations of rights, the environmental rights, the right to peace, the rights to development, the social solidarity rights that can't be understood simply in the categories of first and second generation rights; and I said if we envisage a Bill of Rights as encompassing all three generations of rights then it can become an instrument of emancipation, of transformation, of change. If it's based upon recognising the dignity and basic entitlements to a decent existence of every human being then far from being a break on change it can become an impulse towards change, but insisting that change comes about in an orderly way, in a principled manner and not simply through some kind of state imposition from the top, outside the context of people's rights; and it was an interesting time intellectually for us in exile because we were shifting from notions of people's power in which all authority was given to a centralised state which we trusted would then act for the benefit of everybody to notions of people's rights in which the state does play an important role, a fundamental role, but in responding to the claims and entitlements of people organised in the own ways in civil society and in positions to exercise pressure on the organs of power in society and so the notion of an empowering Bill of Rights that protected freedoms and fundamental freedoms, that ensured that social and economic rights were attended to and that the wider concepts of the environment, of peace and development, were also respect was something that fitted comfortably into the thinking of the liberation movement and something that could be brought into the negotiations with a particular emancipatory thrust that come with the release of Mandela, the unbanning of the ANC the return of the exiles, the sense of the triumph of the democratic ideal; and so as they say it came to pass that democracy, one person one vote, came together with respect for fundamental rights.

The whole notion of a Bill of Rights was not something superimposed upon a sovereign parliament apparently restricting the capacities and powers of parliament, it was part and parcel of the nature of the parliament that was envisaged, that from the beginning it would function within a framework of respect for fundamental rights and the way I wrote at the time was that when you vote for your member of parliament you entrusting that person with the power to govern, you're not giving up certain <??> parts of yourself that need protection from intrusion by the state, you're not giving that up and you're also not empowering that person with the right to oppress. Both involve the exercise the power governing and oppression but one is done with a legitimate purpose of improving the quality of life for people, the other is done, if not with the purpose, with the impact of reducing the respect for the dignity and worth of people in the community.

Well, that was part of the historical background. When it came to negotiating the Bill of Rights, one of the most hotly contested issue was precisely whether or not to include a judiciable social and economic rights in the Constitution. By judiciable I mean rights that can be enforced directly by the courts without the need to have legislation giving positive claims to individuals under health, education, welfare whatever it might be; and the criticism of having enforceable rights came from two sides. The radical criticism was we can't entrust important matters of social welfare to the judges, they are conservative by training, by selection, by cast of mind and it will be dangerous to constitutionalise these rights, it will end up disempowering the poor and the marginalised. Let these rights simply be expressed not as judiciable rights but as directives of government policy and Ireland was the first country as far as I know to do that in the 1930s in their Constitution. India did the same in their wonderful Constitution of the 1940s. Namibia, which got it's independence had an outstanding Constitution just before ours in which many respects served as a full dress rehearsal for us in addition to be the actual real performance for Namibia also only has directives of state policy.

I might mention in passing that creative Indian judges use these directives of state policy to interpret the fundamental rights so that a declaration, an enforceable right which said "No one shall be deprived of life, liberty or property without due process of law" when this was applied to the pavement dwellers of Bombay, who were booted out from central areas and deprived of their livelihoods and they're living under the barrows at night, the Supreme Court said they were being deprived without due process of law of life. Life mustn't be seen simply as animal existence, life is something that has to be informed by the directives of state policy, the capacity to earn a livelihood, to feed yourself, to get shelter are all part and parcel of the right to life and so they used the directives of state policy to inform the understanding of the protected rights.

So, that was the argument, that's enough in South Africa we can do it that way. The more conservative argument was, this is not what judges should be dealing with at all. Judges are there to protect fundamental rights and freedoms, civil liberties and if they are swamped with cases of this kind then they won't be doing their proper job which is to protect the citizen against intrusions by the state. Both those arguments failed in the Constitutional Assembly.

Every now and then an academic plays a role in public life, it might pass unnoticed, but deserves to be acknowledge. Sandy Ledenburg at the University of the Western Cape had a passion, a commitment, a fanaticism you can use what word you like about the importance about constitutionalising as fully enforceable rights social and economic rights especially in a country like South Africa with it's massive inequalities directly related to race and exploitation by the state or supported by the state in the past; and she was the coordinator of a major campaign, the thrust from inside parliament came, as I understand it primarily from the women's <??> of the ANC and they were saying that these rights are particularly important for women to bear the burden of deprivation in relation to health, education, shelter; who pay the costs more dearly than many of the men because of the lack of access to these facilities

and eventually it was included in the Bill of Rights as fully judiciable rights, no different in quality from the basic freedom rights, the right to vote, the rights of assembly, free speech and so on.

The conceptual arguments against constitutionalising a Bill of Rights can be categorised in to three. The one is accountability argument. Judges are not accountable to the electorate, they can pronounce; they can't be replaced, they are independent; it's really for the democratically chosen bodies and the executive answerable to the democratically chosen bodies to decide on questions of priorities, budgetary expenditure, social welfare, that's what politics is about, that's what parties divide over.

What's the response to that? Part of the answer at least, even if general terms their proposition is correct, is that there are some issues where it's actually an advantage for judges not to be accountable to the electorate, particularly when you're dealing with marginalised communities who don't exercise political power, who in fact are frequently the targets of majoritarian prejudice, anxiety, against whom there can be public mobilisation, they can't have recourse to the democratic institutions and yet if your society is based on notions that there are certain fundamental features of public life which respect the basic dignity and humanity of every human being it is precisely those groups that are most urgently in need of constitutional protection, that's why you have fundamental rights, that's why you have a European Court of Human Rights, that's why you have a Human Relations Act in this country. If you're simply leaving it to the good will of parliament then you don't need that and public opinion. So, the very notion of entrenching rights is to say that there is a kind of basic framework that it's crucial to the very nature of your democracy, that says every human being is entitled to certain basic decencies of existence, whoever they are, however unpopular they might be and sometimes it precisely those who are most marginalised, most unpopular, most subject to prejudice or hostility from the majority who are the ones who have the claim and the fact that we are not elected, that we don't have to answer to the electorate, that we're not looking over our shoulders, we're not forced to make compromises that people in public life frequently are forced to make actually gives us an advantage over the democratic elected bodies in those particular respects. So one needs some kind of balance between the broad principle that yes it's not our function, yes it is the function of the legislator to attend to those problems but circumstances arise where minority groups who can't rely on the political process are subject to such a degree of dehumanisation, of lack of respect for their dignity that the courts must intervene.

The second argument concerns institutional capacity. What do we know about low cost housing? What do we know about budgets, priorities, sewage, land, materials? Whether it's better to have medium density blocks of flats or single residences, close to the centre of town, far from town, we don't know; and it's not the kind of thing you can become an expert on in a matter of days or weeks or months. That's what government is there for, that's what parliament is there for and they have hearings and they have inputs from all sorts of people and it's in the very nature of the political process that you do compromise and compromise is not a bad thing in a democratic pluralist society, give and take, but when you are dealing with matters of principle compromise is bad. It's different from balancing, balancing is done on a principle basis, balancing out different interests of the individual, of the community, of different groups in society.

So, the nature of our process is different, it's inappropriate for these kinds of decisions and we just don't have the know how and the capacity to handle those questions, but we do know about human dignity, we do know about oppression, we do know about things that reduce a human being below the status that everybody's entitled to. Our whole lives, particularly those of us who were engaged in the anti-apartheid struggle, had been dedicated precisely to those kinds of questions and often to see the surface, behind the claims and the pretensions, to look at the impact of measures on people and their dignity and maybe we are

better off than those who are so caught up with problems of the budget and bureaucracy and organisation that sometimes they forget the little people, the ordinary people. So, that becomes a strength in our particular area of expertise and a weakness in the area of expertise and sometimes the two meet.

The third theme is related to the question of positive and negative rights, expenditure of money, it's not the function of judges to involve themselves in matters like that. That's relatively easily dismissed. If you're going to have the right to vote you need elections, elections are extremely expensive, you pay electoral officers, you set up voting booths. If you're going to have the right to legal aid in important cases the government is obliged to spend money on that and even the defence of the basic freedom rights means you've got to have courts, you've got to pay my salary and it's the only salary that's actually protected in the Constitution as such. The state needs a whole structure to defend property rights. There are deeds registries, this is all expenditure by the state to enable even the classic rights, civil liberties to be protected. I don't think that's the real argument.

The real concern and it is a real concern is that somehow the right to bread will submerge the right to freedom and it has some historical validity in as much as certain states have said in order to achieve national development and to help the masses we've got to suppress freedom of speech and pluralism in a multi-party state and that is a legitimate concern, but can it be that freedom and bread are incompatible means to say we don't want freedom without bread, we don't want bread without freedom, we want freedom and we want bread; and in fact as <??> has shown in open democratic societies you don't get famine because shortages of food are dealt with in terms of public accountability for distribution and in dictatorships you get famine and starvation, same quantity of food but being siphoned off only by the rich because it's not an open society. The two are not incompatible and a society in which people are not simply striving to survive but they are educated and they can read and study and learn about the world and have electricity at night for study is a society which people can make much more informed choices and choices about freedom, about what they want then a society where the struggle for survival is overwhelming. So, these are interrelated and we use to hear from ordinary people, "Why is there is opposition to the right to education being a fundamental right?" The whites used to say "We can't give you the vote because you're uneducated." "Now we want education as a basic right and you say 'No, it's not a basic right.' How can you say the right to access to health isn't a basic right when our children are dying of measles, they don't even live?" Can it be that, as some people have said in the United States, for example, with a total emphasis on freedom you're dying of hunger and you can use your last breath to curse the government. Is that what a constitutional state envisages? Or is there connection between freedom and bread? Both are necessary for the all round human being and the one instead of undermining the other should be seen as reinforcing the other?

Well, that was the intellectual background to our interpretation of these particular provisions and we couldn't accept the idea that the rights of the child in the case of <??> should be the way of dealing with this question. It's a back door way of facing up directly to the question of how do you enforce social and economic rights; and again this was an example of where a community law centre at the University of the Western Cape, together with the Legal Resources Centre appearing as a <??> shifted the whole discourse and got us to focus on what's really meant, what entitlements flow from everyone has the right of access to adequate housing, the state shall take reasonable legislative and other measures progressively to realise that right within its available resources.

Let me throw out to you, you've heard that expression, articulation of what's in the Constitution. What was the key phrase or word that enabled us the lever with which one can shift the world, the lever that enabled us to, as it were prize open, move the enforcement of social and economic rights? Everyone has the right of access to adequate housing, the state

shall take reasonable legislative and other measures progressively to realise that right within its available resources.

Are there any students of yours here?

Christine Chinkin

I won't name them, yes.

Albie Sachs

Anybody?

Audience Member

Reasonable.

Albie Sachs

Reasonable? It wasn't enough to say that the state has provided 700,000 brick houses for people living in desperate circumstances if at the same time it didn't make provision for the Mrs <??> who were in a state of total crisis and complete desperation, who had nothing. People who were victims of floods and fire, who ended up without even a little plot of land on which to erect their shacks. At the same time we didn't want to order housing just for them, we didn't want to tell the state how it should deal with the Mrs <??>, so we said it was unreasonable not have a crisis programme in place and we ordered the state to produce a crisis housing programme. We left it to the state to decide whether it's done at the national level, provincially, locally, we left it to the state to decide whether they simply give land to people and say "Build your own shacks" or whether they give materials or whether they induce the private sector to put up low cost housing. All that is left to the discretion of the state, they know how best to do it. But we said to the extent that you don't have a crisis programme in place for people in extreme desperation so much so that their right to human dignity is being assailed and this is where we saw the interrelatedness of the different rights, it's not simply a right of access to adequate housing that can be responded to in a purely quantitative sense. If people are left out literally in the cold in circumstances where the rain is pouring down on them and they only have a plastic sheet to cover themselves, then their human dignity is being assailed and if there is no programme, there are no funds, there are no resources to deal with the situation of people like that of whom there are many in our country then the state is not acting reasonably. Where the state gets the money from is up to the state, they can take it from the formal housing programme, they can take it from defence, they can take it from anywhere except as I mentioned from the judges' salaries and that was how we balanced out the appropriate role and functioning of the state in providing the detail, the texture, the priorities with the institutional capacity with the need to protect the fundamental dignity of human beings in the context of access to housing.

The next big case that came dealt with the provision of <??> to pregnant women about to give birth, women living with the HIV virus. It was one of those issues that provoked intense emotion in our country. The treatment action campaign had mobilised tens of thousands of people living with HIV, not simply to see themselves as marginalised victims of a terrible disease but as people actively determining their lives as best they could, influencing society and became as council said in the case the most lively and effective civil society organisation in our country. Many of them having learnt in the ranks of the ANC, in the struggle days how to combine activities in the street, public opinion and litigation.

The government had decided, or the Ministry of Health had decided that <??> would be made available only in two sites in each of the nine provinces to gain experience in its use over a period of a year or two before it was rolled out for the whole country. Doctors in other public facilities were up in arms, they said "We can provide it to our patients, we want to do it, with informed consent we can follow up, it's costing nothing because it's been given free

for five years by the manufacturers, this is unreasonable." We were subjected to what I might call an intellectual assault from two completely different sources. On the one side council for the government was saying it's not for judges to prescribe drugs, the separation of powers entrusts responsibility for matters like this to the government, to parliament, to the Ministry of Health. Judges must do what judges do well, stick to that and not interfere even if we're wrong. If we're wrong the remedy is not to go to court, the remedy is a political one, inside our organisations at the next elections.

The argument from the other side, the more radical side, was to say; we're not satisfied simply with ordering that the government provides programmes to deal with people in situations, generically falling below the standards required by the Constitution. Each individual has a right to a minimum core of entitlement in terms of housing, health, education, welfare, water, electricity and so on. These are individual rights that can be claimed immediately in court if you can establish that you fall below the minimum level of a decent existence that any society should be able to afford. There was a long interchange between myself and <??> on this very issue, certainly one of the highlights for me in my years on the bench and I put the question to him, does that mean that somebody living up in the mountains can come to court and say "I want water provided, clean water, from a tap" even if the cost of doing that would furnish water for 10,000 people living lower down on the plains. Is that what the Constitution implies? Does it imply that those with the sharpest elbows, the best lawyers will get a house, will get the water, get electricity, that the courts now become the locus, the sight, the place where these issues are being determined; and how can a judge in one area decide something that will have a knock on effect in terms of people living in another area, the resources are limited? In any event we decided against that argument. We didn't reject the minimum core notion which has been advanced by the United Nations Committee on social and economic rights as being obligatory for all states but we implied that the minimum core can be reached through these programmes where the detail is left to the discretion of the government and didn't have to be met simply by individual entitlements which will be completely unmanageable and would end up discrediting the whole notion of social and economic rights.

When it came to the separation of powers argument, however, we said it's the Constitution that gives the Constitutional Court the task of enforcing constitutional rights and the Constitution say everybody has these rights. So we're not interfering with government unduly when we enforce the rights that are in the Constitution and even if it means intruding on policy that's what we're obliged to do in terms of our Oath of Office. Far from not respecting the separation of powers we are fulfilling our obligation in terms of the separation of powers that gives the judicial authority the independent power to ensure the that Constitution is obeyed and so we ordered the Ministry of Health to make <??> available in all public facilities where the doctors call for it and where they were in a position to control its proper use. We were asked as well to require government to report back to the Court within a certain period of time as to what steps they'd taken, we refused to do that. We pointed out that the government had been absolutely correct in the past in terms of fulfilling orders that came from the Court, we had no reason to suspect or no reason in place before as to show the government wouldn't do so in the present case and therefore we refused to make that extra order. That's all part and parcel of the dialogue between the different branches of government. It's a kind of a conversation and in fact I'm going to offer a prize to anybody here who can come up with an adequate substitute for the word "deferential" or "defer" that the courts must defer to government in relation to this matters. Defer makes us feel like Euriah Heap and the alternative isn't to be aggressive or to punch them in the nose, so what is the concept, what is the phrase that captures the appropriate relationship; and the prize will be a CD-ROM that I've made dealing with the new constitutional court that we are building on the site of the old prison, old Ford Prison in Johannesburg.

So, let me conclude then. The enforcement of social and economic rights is not based on a disregard for all the queries that are raised because they are legitimate queries. It's not a case of the victory of social and economic rights over a conservative philosophy that sees the role of the courts to be simply to defend basic liberties. It's based upon a reconciling of deep fundamental principles relating to the role of the courts in the 21st Century. When I gave a similar lecture at the University of Chicago, which I did with particular delight in the domain of Milton Friedmann, a response was given to me by Professor <??> who'd been persuaded by a decision in <??> to shift from opposition to enforcing social and economic rights to approval <??> in what he called the balanced way in which we did it; and he's doing research now to show the origins of the indivisibility in the Universal Declaration of Human Rights of the basic fundamental freedoms and social and economic rights and it doesn't come from Eleanor Roosevelt as many people believe, although she was a prime author of that declaration, it comes from Franklin Delaney Roosevelt. People know of his famous "Freedom from Want" as one of the fundamental freedoms but he was arguing and urging in the post new deal period in the United States the integration of all these different kinds of rights as part of a constitutional programme for his country and for the world.

It might be that the statement made, that I heard in Paris not too long ago, might well turn out to be true. The 19th Century was the century in which the executive took command of the state. The 20th Century was a century in which parliament took command of the executive. The 21st Century will be the century in which the judiciary secures the basic rules and processes and values of functioning of both parliament and the executive. I might mention it was a judge that made that prediction. But I think we are entering a new kind of era now and the question is ceasing to be whether or not one can enforce social and economic rights through the courts and the real question is how can it best be done?

A little coda. When we were about to give judgement in the treatment action campaign case, my colleagues and <??> said to me "Albie, are you going to cry again today? I've brought a spare hanky." He'd heard when I was speaking on an occasion similar to this about a case where he'd given the judgement in favour of somebody who'd applied for a job as a steward on board South African Airways, who'd passed all the tests with flying colours but he turned out to be HIV Positive. South African Airways refused, saying, amongst other things that British Airways doesn't allow people with HIV to serve customers because the customers might choose another airline and <??> said "We can't allow the commercial practices of other airlines to dictate the constitutional rights of South African citizens" and it's precisely the role of the Constitution to protect people against that kind of prejudice and to respect the human being. If his illness prevents him from serving the customers then clearly there are grounds for refusing, but the indications were at that stage, his illness did not prevent him from doing that and it was the function particularly of a <??> to protect him from public prejudice of that kind and the South African Airways were ordered to employ him as a steward. The court was packed with people wearing t-shirts saying "HIV Positive". There was silence and as we went out to the passage at the back I heard cheering and I cried; and it was not just with emotion about the impact of AIDS on our country and what it means to the people there, but that sense of pride, of being in a court, defending a Constitution that can protect the fundamental values and dignities of human beings in that way.

In the event I said to <??> the same people with the "HIV Positive" t-shirts, lots of journalists, the place packed, people from all over the world there, I said "No, no, no, I'll be okay." Our judgement was given, we went out of the court, there was cheering from inside and I cried.

Christine Chinkin

Thank you, Justice Sachs, for an inspiring and moving and wonderful exposition I think of the indivisibility of human rights and upholding human dignity.

We have time for questioning and comments. I would ask people to keep them as short and as to the point as possible to allow as many of your...

[END OF SIDE]

... also to ask questions. If you could say briefly who you are and I think what we'll do is take two or three and then to you and then back again. We have about 25 minutes. So I see one here, one here and one at the back at the balcony, I'll take as the first sort of three.

Audience 1

[Microphone cuts out several times]

<??> Social Economist at the London School of Economics. I was thinking about the European Convention as a social economist, I frequently get sent things from representative organisations in the Social Security area making propositions about the inclusion of social insurance rights in the European Convention and also making a reference to statements which were in the original and amended Treaties of Rome about aspirations and objectives of the European Union. I wondered to what extent you had been contacted or had dialogue with that Convention because some of those issues of social and economic rights appear to be highly critical to the development of <??>

Christine Chinkin

Thank you, over here.

Audience 2

I'm from the Women's International League for Peace and Freedom. Do you consider that, or are you seeing that the policies of the international financial institutions, the World Bank and the IMF and structure adjustment generally and particularly the World Trade Organisation trade agreements, are these contradictory to the enforcement of economic, social and cultural rights? For instance, with forcing privatisations which would negatively impact on those rights, for instance, privatisations of health services? I'm thinking particularly of the general agreement on trading services, that that contradicts particularly those rights.

Christine Chinkin

Thank you. We'll go behind you as you were missed out and then up to the top.

Audience 3

Hello. I'm a South African sitting at Oxford, working in this area so I came down to listen to the talk. Since you asked about the deference question, possibly a better term would be respect or mutual respect between the branches of government. But then secondly my real question was as you're probably aware <??> apart from approving of the South African approach has also characterised it as an administrative law approach in so far as the court uses a standard of reasonableness and I wanted to know whether you agreed with that characterisation of the South African Constitutional Courts approach?

Christine Chinkin

Thank you. Take the one up from the – the very back of the balcony.

Audience 4

Thank you. Michael Elman from FIDH.

To what extent to do you consider that these norms can be enforced internationally, for example, by an optional protocol to the international <??> on social, economic and cultural rights and would you be in favour of bringing in such a protocol and of South Africa for example adhering to it?

I have a colleague who also wanted to ask a question, could I...

Audience 5

<??> LSE Sociology and thank you so much for that inspiring talk, I was deeply moved.

My own research focuses on human rights of roamers in Eastern Europe and as you know a vast number of these countries are now joining the EU and are signatory to the ECHR and actually my question is a bit tied to the first person's question with respect to the interest among European judges and constitutional experts concerning the South African example, the case that you mentioned earlier about the lady and her children and her sister and the families who were involved in the flooding issue. This is directly relevant to in particularly Slovakia, Romania, but also Greece where there's a huge number of people living in similar circumstances and I was just wondering if that has raised awareness in Europe as well and what impact it's had, the South African example on Europe? Thank you.

Albie Sachs

I've got written here objectives, dialogue. Do you remember the first question.

Christine Chinkin

Yes, the European Convention and the...

Albie Sachs

Oh, yes.

Yes there hasn't been any direct dialogue at all. We have quite a lot of interaction with a body called the Venice Commission, that was set up to help the development of constitutional courts in Europe. It's based in Venice so they always get good attendance at their meetings; and some people from the Venice Commission came to Johannesburg and said "You know it would be a jolly good idea to have a Constitutional Court in South Africa?" and I said "In fact, I've been a member of such a court for three years!" and since then they've probably become over respectful of what we're doing, but we are, from that point of view our decisions are feeding in to <??> prudence generally internationally and it's quite extraordinary for us actually to see decisions of our court being quoted in the House of Lords here, the Canadian Supreme Court and elsewhere and we really feel we're part and parcel of an international exchange in that way. But there hasn't been any direct contact and on this visit I was staying with Professor Bob Hepple in Cambridge and he's been working, he edited a book on social and labour rights dealing with a lot of these questions and it's familiarising me with development of these rights in countries that are relatively affluent where the <??> production is changing all the time and where progressive thinkers have got to be on the ball. If you simply say "We was robbed!" then you're going to make you're going to be robbed even more in future.

So, you've got to be there, you've got to be part of the intellectual debate, you've got to come up with manageable proposals that win popular support and in that respect the question about how to respond to the international financial institutions just brings to mind an experience of mine about 18 months where I took a train from Helsinki to St Petersburg and literally arrived at the Finland Station. Now some people will know the meaning of "to the Finland Station" but instead of the Bolsheviks and the armed proletariat being there to meet me it was an official from the World Bank. In fact they didn't meet me, they didn't turn up and I found myself attending a conference of the World Bank, they chose St Petersburg because the centre of the old Russian Revolution was the safest place for them to meet in the contemporary world; and the theme was to speak on law and poverty and I had to decide do I go or do I stay away and I decided to go. The very fact that they put that on the agenda indicates that there are people inside the World Bank anxious about these things, trying to redirect priorities and one has to be part of that debate. I'm not saying it's wrong for people

to be outside and protesting and condemning the institutions and maybe the anxiety that the people there had about stones being thrown certainly concentrated their attention far more on these questions than might have been the case otherwise. But the main point of my presentation was to try and shift the debate from poverty relief, which is a top down state directed approach that can end up simply saying "Well, we need good investment policies to get production which we do need to get employment, which we do need to get disposable incomes, which we do need and that's the way to do it and any kind of state regulation and interference with the <??> investment is actually going to slow that down." So that's the danger of that sort of approach.

To move from that approach to the idea of people's rights, social and economic rights to be developed and applied and implemented in a manageable way where the courts don't overstep what really is their province, which is to protect fundamental human dignity and become over intrusive and where the courts avoid what one Indian judge referred to as judicial populism. You can make a pronouncement from the bench that looks fantastic for the people, for the poor, the oppressed, the marginalised but you don't follow up afterwards and it gets you the headlines and it gets you the reputation of being wonderful but in fact it diminishes the very thing that you're trying to achieve so keeping that balance is always difficult.

In terms of your broad proposition, there's no doubt that what we need in the developing world is proper terms of trade, we need access to intellectual resources, it's painful to see many resources taken from our continent, seed and other resources, sometimes even knowledge, medical knowledge, appropriated by commercial firms, there's nothing wrong with them using them and even making profits out of their investments and so on but then we have to pay huge prices to get back what came from our continent and when it comes to things like HIV AIDS where millions of people are affected, where anti-retro virals can make a huge difference to the quality of life, as we've seen with our colleague, Edwin Cameron, living with HIV just about entering the phase of full blown AIDS taking the cocktail and being transformed as a person and making a huge contribution to our <??> prudence, simply because he can afford it and the millions of people who can't afford it because the prices are kept high and not even to make a profit in Africa because only 2% of sales go to Africa, but to prevent the prices from reduced for poor people in the developed countries then something is terribly, terribly, terribly wrong; and that is a scandal for humankind and a denial of human rights on a massive scale and if I might quote a statement that <??> used as a dedication in a book she wrote quoting her father, she said "The function of the law is to convert misfortune into injustice" and if ever there was an area where that can be done it's in relation to the price medicines that could save lives and that could in a huge way improve the quality of life in Africa.

So, these are complicated areas and I urge people who are going into law now not simply to concentrate on community law and poverty law, but to go for the law affecting the rich, you can do more sometimes to help poor people by getting appropriate mechanisms to regulate the behaviour and expenditure and so on of the rich without destroying <??> and a lively productive economy possibly in that way and certainly in terms of international trade and reducing the price of drugs and having a human policy on intellectual property, maybe one can do more for poor people in the realms of the rich carrying the debates and the argument forward there.

The statement that our focus on reasonableness is simply the principle from administrative law, I don't think <??> reduced it simply to administrative review. He's saying that it is a concept that lawyers are already familiar with, it's not introducing a whole new idea but normally with administrative review you say "Well, the correct procedures haven't been followed, go back again and do it again". Or you say "Well, it's your policy, we're not going substitute our judgement provided you follow the correct procedures, you took account of all

the relevant material". Unless you're a very, very adventurous judge willing to say "Well, you couldn't have taken all relevant factors into account because the outcome is just so absurd, it proves that that has been grossly unreasonable, it's just not sustainable". That's a kind of controversial area. We order government to do things, not simply to follow different procedures. These orders have considerable implications for policy, for priorities, for budgeting that goes well beyond the administrative review that usually of a negative character compelling government to do something again rather than ordering government to actually provide benefits and facilities. But if it is the same as administrative law so be it, we're not claiming any particular virtue in creating a new constitutional concept and if people are comfortable with the idea of saying "Well, it's not all that different" and it enables them to give energy and input to this area I think, speaking for myself, I would be quite happy.

In terms of international treaties the international covenant on economic, social and cultural rights already includes all these rights and has the provision on which our constitutional commitment was based, that's the state parties to these treaties shall take, it doesn't say reasonable, shall take measures progressively to realise these rights within their available resources. So, the notion of these being rights that progressively unfold is already in the international treaties, what maybe was unfortunate was maybe in the Cold War setting the International Convention on Civil and Political Rights was separated from the international convention on social, economic and cultural rights and they were given separate domains, as if one can separate out in real life these particular domains. In that sense an integration and indivisibility that was in the original Universal Declaration of Human Rights was undermined by having separate documents and what we're doing now is really putting together those whom the drafters had put asunder. We are joining together those whom had been asunder and so we are not, in that sense, inventing something new, we're recovering something that existed before. So I don't think a special new protocol is required, it's simply to get state parties who haven't signed up to the international covenant to do so and those that have signed up to take the obligation seriously and to pay attention to what have often been very thoughtful comments from the international committee that deals with these matters.

Audience Member

[Shouts something out]

Albie Sachs

Oh, I see, okay.

Audience Member

[Shouts something out]

Albie Sachs

Right, well, that certainly might be helpful, although if the objective really is to – what one wants is something to get governments to shoulder their responsibilities and if a protocol of that kind with the right of individual complaints would facilitate that then certainly that would be helpful and thank you for the idea.

As far as the roamers in fact somebody was speaking to me today about a particularly complex problems there because some states follow a policy of settling the roamers and providing houses and schools and water in an established site and the identity of the community gets lost in that way. They are being, in the way that used to be termed "civilised" and a lot of the core values are being lost. On the other hand the mere fact that they move, that they travel shouldn't deprive them of the rights of access to these basic entitlements and so the real problem there is how to harmonise both, not to say "Well, if you want to travel, you're not entitled to any of these rights," nor to say "Well, what's your problem, we're giving you these rights, but you must stay still." and that's what progressive lawyers are about and

ought to be about and those are the kinds of questions you can only solve through dialogue. Not by having a good policy and imposing it on people, but by entering into an active, dignified relationship with the persons concerned, bearing in mind the interests of everybody, even including prejudiced neighbours who are also part of the community to try and get appropriate solutions.

Christine Chinkin

Thank you. Yes, as usual. We'll have one more round, we'll restrict them just to three, because we are getting sort of very, very close.

Okay, person at the back.

Audience 6

My name is Percy Gorgy, I'm an alumnus of the LSE and I studied International Relations and I'm now a freelance journalist and I'd like to ask a more generalised question. Now, would the admirable truth and reconciliation commission in South Africa, could the spirit of it be conveyed to the Middle East conflict in order to try and persuade the Palestinian Arabs to engage in talks with the Israelis over their differences because as a result of the Oslo Process of 1993 the Palestinian Arabs got all of Gaza and nine major towns in the West Bank and so if they stopped initiating attacks against the Israelis who have the right to self defence according to the UN...

Albie Sachs

I'm going to stop you now.

Audience 6

All right, thank you, you've got my point.

Albie Sachs

Okay, I've got your point.

Christine Chinkin

Just a couple more then. Take one over there, yeah, and then do you want to choose the last one?

Audience 7

Hello, I'm a student at the LSE and I'm rather ashamed to say that I'm English. What would you do about our immigration rules?

Albie Sachs

Now I'm going to tell you straight off, I'm not answering the first question, I'm not answering the second one, not that I don't have views and in fact I might mention that I twice received asylum in this country, I owe a lot to the UK and my honouring of this country is very much influenced by the fact that when I was coming out of solitary confined prison you were willing to receive me in asylum and when I was blown up by the bomb and carried here on a stretcher you received me. So the concept of asylum is something that gives a certain grandeur to this country and I would say don't dissipate it.

So, that's my way of not answering your question. I won't answer the other question because it's another whole debate that belongs in another arena but you had your opportunity to make points and I'll take one more.

Audience 8

<??> Centre for the Study of Global Governance at the LSE. I will actually ask a question about economic and social rights and particularly about the kind of beyond the courts the

inspirational power of economic and social human rights for people in places that do not yet have the wonderful constitution that you have in particular someone has already referred to the international financial institutions. We've had a big movement globally in the last four or five years that was first called the Anti-globalisation or the Anti-capitalist Movement, it's beginning to be called more helpfully I think the Global Social Justice Movement and it's powerful not just in the west but also in countries like Argentina and South Africa, but I find that when it comes to solutions or alternatives they either come up with a very strong state, with all the problems that that has, or with old fashioned Marxist revolutionary rhetoric. Now it seems to me that the economic and social rights maybe a much more fertile language, way of thinking for this movement and I'd like your perspective on that.

Christine Chinkin

I think we'll make that the last one, yes.

Albie Sachs

Yes.

Okay, let me take just one more, it might give me a nice coda and I'll make it... yes.

Audience 9

I may help you. I would like to widen it a bit more, I think answering the question up here. I was in Geneva last year at the very first UN World Civil Society Forum and I think <??> case was very much the way forward which the UN was putting forward. I have been incredibly involved in the South African struggle for 20 years working not only with <??> and people on the ground, but also with various lawyers, Arthur <??> and everybody else and it does seem to me that the South African model is actually the global model for the future.

Albie Sachs

Well, we are obviously very proud as intellectual lawyers, as human beings in having placed this whole theme very much on the map in public consciousness and we think we've made quite a lot of progress, but I don't think we feel that the huge problems of misdistribution of resources in the world, of racism, of poverty, of modernisation can be solved simply on that basis. It's a component, an important component and I think its value is that it places the human being at the centre, people at the centre. In that sense it's different from poverty relief. I'm very much in favour of putting poverty relief on the agenda, if people feel simply to produce more, produce more, produce more and you've still got millions of poor people in the world and the overall production is going up and resources are being used up and the planet is being polluted, there's something serious wrong. So, it is good to demand an end to poverty but the danger is that's seen as a purely top down status kind of activity. On the one hand I don't agree with those who see the state as the enemy and that's particularly so in developing countries. There are people from outside who want to invest and get what they can from our countries who would love to see weak states where they can control everything, the others who would like to see relatively strong states that can at least protect their investments. But, poor people do need an authority out there capable of ensuring access to fundamental resources. When you are thinking of something like electricity that's so vital in our country, I mean Mrs <??> will be cooking with a paraffin stove, she'd have candles at night, they inhale fumes, there are fires that break out that sweep through these shacks every year. She can't keep food in cool circumstances, to protect from maggots in summer, she can't heat water in winter. Electricity for her is access to life and she's not going to get it because she can pay for it, because she can't pay for it. Poor people can't pay for these resources and unless there's some form of social commitment which means the state ensuring that electricity is provided and provided cheaply or for nothing for people like her, or clean water for her, she's just not going to get it.

So, I don't support that the state is the enemy kind of approach. On the other hand the command state, the totally bureaucratic state, the state doesn't see people out there, the state that uses its authority to enrich the incumbents and disregards the poor is an enemy state but you don't simply say it's the state as such that's the enemy, these are defects in the way the state functions and defects that have to be challenged and dealt with in an appropriate way.

So I would like to see the progress that we've made through <??> and the TAC case as illuminating one path that can be usefully followed. In getting away from extreme polarities of argument, polarities can aid revolution but polarities usually aid those in power because they will resist and defend where they are and so to avoid that complete polarisation, to engage in the debate, to attend to the details, even if you can't change the whole system there and then I think is an absolutely valid kind of a programme. It might well be that my attitude to this is associated with the fact that now I'm a judge, after spending all my life fighting authority and trying to undermine legitimacy, now I'm the most legitimate of everybody. You can't be more legitimate than a constitutional court judge and it might be that I'm seeing the world from a different position which inclines me towards looking for harmonisation. But I don't really believe that, I don't feel that I'm being intellectually dishonest or portraying the things that brought me into the struggle all those years ago.

I worked together with my colleagues when I listen to counsel, when I receive the arguments <??> when I read the journals and generally immerse myself in the life of my country and of the world in coming up with a kind of things we do. I see it as a continuation in a particular area, which doesn't absolve people from fighting in other areas in their own ways to achieve similar outcomes and results.

Thank you.

Christine Chinkin

That leaves me with just two functions. The first is to say there is a reception upstairs on the third floor in the Robinson room to which everybody is invited and the last one is to thank Justice Sachs again for returning back to the LSE and I hope you didn't find it too drab this time.

Albie Sachs

There's a third one, which I'll take over. I'm speaking on the 12 March at a presentation similar to this, it's entitled "The House that Cyril Built". Cyril is Cyril <??> who was the chairperson of the Constitutional Assembly that drafted our new Constitution that called for a Constitutional Court that requires a building for the Constitutional Court and we're putting up that building on the site of the old Fort Prison in Johannesburg, where <??> Mandela were locked up and I'm going to speak about what a House of Justice should be like.

Before coming here today I was in the Court of Appeals, I think the Royal Courts of Justice and it's a very elegant building in its own tradition and style and the judges couldn't have been more courteous and kind and enlightening and amusing with me and even provided a very good meal afterwards, but it's not the kind of building that we envisage.

So if you'd like to come and maybe participate in the debate between lawyers and architects and planners and artists and human rights experts as to the, if you like, the architectural setting in which human rights issues are to be debated you might like to come. I think it's a 5:00 or 5:30 or 6pm on the 12 March at LSE in the Graham Wallace room and it's organised by the Regional Planning Institute, so I might see some of you there.

Christine Chinkin

And thank you again.

[END]