

Review Article

JUSTICE AND RIGHTS IN THE NEW SOUTH AFRICA

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Albie Sachs has recently published an important new work on the future of human rights in South Africa. The work, *Protecting Human Rights in a New South Africa*, aims to develop proposals for a just new South Africa, but the focus is on rights: 'What follows is an attempt to apply the logic of a human rights approach to the building of non-racial democracy in South Africa' (Sachs, 1990:vii). The book covers a wide terrain - Sachs wants the new South Africa to institutionalize not only first generation rights (civil and political rights) but also second generation rights (social and economic rights) and third generation rights (which include the right to peace, self-determination, and the right to a healthy environment) (1990:7-8,145).

Thus one of the particularly interesting features of the work is that Sachs argues that a Bill of Rights should incorporate all three types of rights. The idea, as he puts it, is to 'harmonize all three' (1990:8). At a prima facie level this makes sense. First generation rights are clearly insufficient, especially in a country with such vast social and economic inequalities. All people must be granted basic housing, healthcare, free education, and so on. Third generation rights complete the picture. All require to live for example, in a clean environment, and this affects the working class, as much as non-working class people (1990:141-42). Sachs is motivated by a concern to have the most humane and civilized South Africa possible. So much so that the implication is that South Africa could have a more advanced system of rights than that of even some first world countries,¹ in which second generation rights (and, certainly, third generation rights) are not fully institutionalized.

A second virtue of the work is that it tries to place the issue of rights in South Africa in historical context. Sachs maintains with good reason that the constitutions in Europe and North America were adopted in response to the demands of people trying to liberate themselves from their oppressors. Thus he suggests, for example, that there is a relationship between the struggles for independence of the American settlers and the nature of the American constitution, and between the French revolution and the Declaration of Human Rights. Sachs believes the focus on history will help make the language of rights legitimate in South African circles in which talk about rights is generally considered no more than a ploy to

preserve the interests of the ruling group.

Sachs is arguing for a Bill of Rights that reflects the aspirations of the oppressed. Thus he argues that because apartheid has involved the systematic discrimination against black people on a variety of different fronts - in politics, society and the economy - a South African Bill of Rights should seek to rectify this quite unambiguously. The South African Bill of Rights must embody more than just guarantees of civil and political liberties, if it is to be just. If only first generation rights are guaranteed, then rectification of past injustice will be impossible. For instance, with respect to the land question, if property is guaranteed, Sachs argues, then the existing unjust dispensation will be legally sanctioned. Hence institutionalizing a right to property without any qualifications will merely maintain the historical legacy of the expropriation of black land (1990:11). Sachs proposes quite logically that to make up for all this discrimination, a comprehensive plan of affirmative action is needed and that this should be embodied in the Bill of Rights (1990:12,20).

There is much that is of interest in Sachs' book. There are original suggestions about a number of topics - these include land rights, and rights charters for groups who might need special protection, such as women, workers, and children. There are useful discussions of legal aid, and the importance of a culture of rights for developing a common South African citizenship. My examination will concentrate on the central theoretical issues in the work. These seem to be the following: the question of affirmative action in the South African context, and the type and extent of the rights proposed for the new constitution.

The first issue is whether to make affirmative action the key constitutional principle. Almost all commentators, except those on the extreme right, agree on the need to rectify the gross past injustices of South Africa. The question is whether making affirmative action the key principle is the most effective way to secure social and economic justice? There are some important difficulties. First, constitutions are usually designed for the long term; once affirmative action has completed its task and past injustices are overcome, what happens to the affirmative action rule? As Brooks argues, at a certain point in time, if all goes well, reasonable equality of opportunity will have been reached. Continuing with affirmative action beyond this point could lead to new injustices (1990: 33). In order to deal with this problem, the constitution would have to stipulate criteria for a cut-off point. At the very least there ought to be clear criteria about what counts as a realization of the programme. But establishing such criteria is no easy task, especially given that affirmative action must occur across a variety of fronts. It is to apply to housing as well as 'health, education, leisure, to mention but a few' (Sachs, 1990:19). This is in contrast to the USA in which affirmative action is applied in a limited domain, namely, access to jobs and entrance to educational

institutions. Sachs points to other attempts, such as India and Malaysia, but he does not discuss the success of these programmes (1990:170).

This leads onto the second problem. Affirmative action might only benefit the black elite and not the masses. There is evidence to suggest that the result of affirmative action in the US was that middle-class blacks benefited while the poorer sections of the community received no real gains (for example, Glasser, 1988). One solution would be to relate affirmative action to economic need, as well as to race. It is clear that much more detailed work needs to be done, and that Sachs' discussion, while suggestive, avoids key problems.

A better road to take, in the author's opinion, simply would be to entrench social and economic rights. Guaranteeing social and economic rights would in any case commit the government to realize basic socio-economic justice in South Africa. Also the presence of these rights in the constitution would always be there to ensure that no one at any later time would fail to obtain a minimal standard of living. Affirmative action could be stipulated as one possible mechanism for helping to secure basic social and economic rights.

Sachs, too, believes that the South African constitution must contain social and economic rights. The Bill of Rights must go beyond the standard liberal approach, which is concerned to entrench only first generation rights. For instance, Sachs writes: 'The right to be free and the right not to be hungry are both fundamental human rights to be defended and fought for as vigorously as possible' (1990:190). It is worth noting that philosophers who think rights central in discussions of basic principles for society, generally agree that first generation rights are justified. For these philosophers the domain of rights definitely includes civil and political rights - such as the right to vote, freedom of speech, the right of free association, and the right to a fair trial.

A right, it should be emphasized, is something fundamental. It cannot be abrogated except in exceptional circumstances, such as when it conflicts with more basic rights, such as the right of self-defense. Usually, a right is restricted if this is needed to preserve the whole system of rights. For instance, freedom of speech is limited in times of war, because free communication might help the enemy get strategic information. Here one right, freedom of speech, is being temporarily restricted in order to protect the whole system of civil and political rights (for a discussion, see Rawls, 1971:201ff, and Dworkin, 1977:266ff). Some philosophers think that social and economic rights are not really rights but rather desirable goals, which the community should try to realize if it can, but which it is not strictly obliged to. Failure on the part of the state to satisfy basic social and economic needs would not be construed as violating anyone's rights (see, for example, Narveson, 1981).

Unfortunately, Sachs does not indicate at all why important social and

economic demands should have the status of rights. This brings us to the central theoretical problem with *Protecting Human Rights in a New South Africa*. Sachs wants to go beyond standard liberal conceptions of rights, but he fails to provide adequate justification for doing so. While the work provides a useful historical account of the development of rights, it does not debate at all the controversial nature of the various 'rights' that have been debated over centuries. It is striking that a book whose central theme is human rights does not contain a single reference to any of the theoretical problems involved. This is very surprising given that all the constitutions that Sachs talks about were heavily influenced by philosophers: the American constitution by Locke, the French constitution by Enlightenment thinkers such as Diderot and Rousseau, and the Soviet constitution by Marxist philosophers. This is not a question of academic nicety. My contention is that Sachs' position is seriously disadvantaged by his complete neglect of philosophical writings on the subject. The result is that his position appears weaker than it actually is.

Firstly, Sachs provides no defense at all of the idea that rights are necessary in deliberations on what the good or just society should be. Sachs does not indicate at all why people should justify claims in terms of the language of rights. Why should 'rights' be part of the good society? It is not self-evident that they ought to be. A number of philosophers have rejected the rights approach per se. These include conservatives, utilitarians and Marxists.² It is strange that Sachs does not refer to this given that he is a member of an organization (the ANC) which has had a close alliance with the South African Communist Party for decades. One expects that there must have been debate on this issue.

It is worth remarking that Marxists in particular have regarded talk about rights as being part of the ideology of capitalist society. Concepts like 'right' and 'justice' are for Marx merely the form in which people try and sort out unfair practices of capitalist society. For Marx, capitalism is not to be condemned because it is unjust or flouts human rights, but because it subjects the majority to the servitude of wage labour. Fair treatment will not alter this basic fact. In fact Marx regards the exchange between worker and capitalist as just. Even when freedom of contract and the rule of law are being applied, Marx still condemns capitalism because he believes it deprives the overwhelming majority of opportunities for freedom and self-realization.³ Consequently, communism is to be striven for because it will promote these values. Marx thinks that the language of rights functions as an ideology in capitalist society. In communism this language will become redundant because exploitation and scarcity, to all intents and purposes, will no longer exist (see Buchanan, 1982:162ff). Sachs would seem to be rejecting Marx's views, but he provides no discussion of the matter.

It is also worth remarking on Sachs' treatment of the so-called third generation

rights. Being relatively new, these rights have hardly been theorized. Once again Sachs' argument is thin. According to Sachs, third generation rights include: 'the right to peace, development and a clean environment' (1990:18). Some of these, however, seem redundant. For example, what does 'the right to peace' mean? This 'right' is encompassed by standard civil and political rights - rights to life, privacy, and protection of (personal) property. At the international level, what could this 'right' mean? This is captured also by first generation rights - the right to self-defense. A 'right to peace' seems gratuitous. The right to a clean environment makes more sense. For this right to be guaranteed it requires that government has a duty to see to it that a clean environment is maintained. One could argue that a clean environment is more than just a desirable goal, but is actually a right. One argument might be that a clean environment is basic to a person's health and thus to a person's capacity to lead a decent life. I cannot consider this matter further here. The point is that Sachs does not discuss the issue and so one is left without a clear idea of what exactly 'third generation rights' amount to.

Returning to the main issue, how would one justify social and economic rights? In other words, why should the community have a duty to satisfy basic social and economic needs? Since, along with Sachs, I am of the opinion that social and economic rights are worth taking very seriously in the South African context, I believe it appropriate to indicate the lines for their possible justification.

One justification for socio-economic rights is that first generation rights cannot be exercised without at the same time meeting basic social and economic needs. The socio-economic circumstances of people are directly relevant to their ability to exercise their civil and political rights. The issue of legal representation for the poor is an example. It seems that the state has a duty to provide free legal representation to the poor, for without it the right to a fair trial would be virtually meaningless. One could make a similar case for the other civil and political rights. Before one can effectively exercise the right to vote, for example, one must be sufficiently educated, have reasonable housing, and decent healthcare. Without these one is unlikely to have the resources to make an informed decision. People preoccupied with survival can hardly be expected to take proper advantage of first generation rights. So one can argue that the proper exercise of first generation rights demands the satisfaction of basic social and economic needs. One could argue further that since satisfying social and economic needs is so crucial to exercising civil and political rights, the demands for basic social and economic goods should be accorded the status of rights.

But there is a second and more direct justification. One important defense of the claim that people have rights is that rights are strongly connected with the autonomy of the person (the following argument is based on Benn, 1978). If human beings are autonomous, they are conceived of as agents who choose life

plans and initiate actions to realize them. On this account the basis of rights is respect for persons taking responsibility for their own lives. Now all adults who are reasonably sane are autonomous and must be shown equal consideration with regard to their desires to realize life plans. In order to be able to choose a life plan and act to achieve it, the argument goes, both socio-economic as well as civil and political rights are necessary. Without civil and political freedoms individuals cannot engage in the activities necessary for them to choose and carry out a life plan: these include the freedom to associate with whom one wants, the freedom to be secure in one's property and person, freedom of expression, the freedom not to be arbitrarily arrested, and so on. But clearly satisfaction of basic social and economic needs is also indispensable for the choosing and carrying out of a life plan. Being preoccupied with survival would certainly limit a person's ability to realize a life plan. Thus based on arguments about autonomy, social and economic rights would seem just as important to people as civil and political rights.

If these arguments are valid, then demands for basic material provision - shelter, healthcare, education, etc (1990:145), are more than worthy goals which the state should try to realize. They are rights that all individuals have with respect to the community. Consequently, a society that is deficient in this regard would be a society that would be guilty of human rights violations. If a society were to guarantee civil and political rights but not social and economic ones, and a great number of its citizens did not have basic material needs satisfied, this society would be guilty of major infringements on human rights. One proviso is necessary. If the society were so poor that everyone lived at a miserable level, the society could not be blamed for failing to guarantee social and economic rights. But this obviously raises questions, especially as far as South Africa is concerned, concerning the distribution of resources. In a country with vast inequalities the failure to secure basic social and economic rights is unjustifiable. The burden of proof in general rests on those who would argue that the society genuinely cannot afford to guarantee these rights. These considerations hopefully go some way in justifying the idea that a Bill of Rights in South Africa must incorporate social and economic rights as well as civil and political rights.⁴

Sachs, as observed, wants the Bill of Rights to reflect a balance between the three different types of rights. Though one can approve of Sachs' desire to have recognition of all three kinds of rights (on the assumption, of course, that third generation rights are intelligible), Sachs ignores the fact that different rights often come into conflict with each other. For example, he writes that workers as well as middle class people have an interest in a clean environment: workers desire a healthy work environment, they don't want consumer goods contaminated by chemicals, and they are opposed to toxic dumps (1990:141-42). But the matter

is not as simple as that. Consider the case in which some pollution is the price of maintaining the operation of certain factories. Workers in these factories might prefer keeping their jobs to having a clean environment. They might, especially, want to retain their jobs (assuming there is no alternative employment) if the only effect is to pollute the environments of communities beside their own.

There are many other cases in which rights might conflict with each other. For example, realizing equal healthcare might entail limiting the freedom of the better off to have luxury medical care. Busing in the US is another example. Beginning in the late-1960s, school children of different races were bused to specific schools in order to eliminate racially segregated schools. Here the freedom of some was restricted for the sake of promoting the goals of integration and equal opportunity. Clearly, there is no obvious harmony between the different kinds of rights. Whilst a commitment to first, second and third generation rights would mean taking them all very seriously, some kind of trading between the different kinds of rights seem unavoidable. The pressing needs of the mass of South Africans will give rise to some hard choices. Sachs' account is much too sanguine to deal with this.

There are further worries when it comes to Sachs' proposals on freedom of speech. Sachs is admirably sensitive to the fact that given South Africa's racist history, freedom of expression is a delicate matter. In this regard Sachs proposes the following. The constitution 'should include a shared undertaking not to indulge in mutual insults and not to permit the mobilization of rabid racist or ethnic feelings for political advantage. In this sense, democracy and non-racism become inseparable - there is no democratic right to be racist. You do not have to love your neighbour, but you can be prevented from insulting him or her' (1990:51). If insults directed at a neighbour are to be disallowed we could be heading for Orwellian controls. Clearly Sachs is stretching things here. There might be good reason to restrict speech which is deeply offensive to a particular community and which is made in a context that could clearly lead to interference with that community's rights. There is a big difference between racist insults made towards a neighbour and racist insults made during a march through the community which is the object of opprobrium. Stopping a march is very different from prohibiting individuals insulting one another in day to day life. Obviously, such behaviour should not be condoned, but the costs of preventing it far outweigh the gains.

To his credit Sachs does go beyond the purely formal approach to questions of freedom of speech, in his discussion of the class dimension of expression in South Africa (1990:52). While the highly concentrated nature of the media in South Africa does not go against the formal right to freedom of speech, in effect it prevents many from having the means to communicate their opinions effectively.

Quite simply historically disadvantaged sectors of society cannot begin to compete with the resources of conglomerates. Sachs quite rightly rejects government control of the media as the solution, but he does not propose any solution for the problem. One possibility is for the state to subsidize media that represents the views of disadvantaged communities.

We remarked earlier that Sachs fails to address the socialist tradition on the question of rights. Socialists who are sceptical of the language of rights are unlikely to be convinced of the importance of rights by *Protecting Human Rights in a New South Africa*. On the other hand, socialists who accept the language of rights would not find Sachs' list of rights sufficient. For example, Sachs does not mention the right to work. Nor does he discuss the related claim that if this right cannot be guaranteed, decent alternatives must be provided. There are various possibilities - they include unemployment benefits and subsidized training for new jobs. Of course, socialists would go further and argue that the right to work includes the right to meaningful work, that is, work that exercises and develops people's capacities, as opposed to being a mere means of survival. The justification could include the claim that all have an equal need to realize their potential.⁵ Obviously, in a country in which basic social and economic rights have not been secured, the right to meaningful work (assuming it can be justified) is less urgent. But that is not to say it is irrelevant. As the South African economy develops the notion of meaningful work might well become a central issue.

Despite these problems, Sachs' book is a very useful work in the current situation, because it places on the table a broad conception of rights. It is the only sustained left wing treatment on the subject, and one which is sensitive to the various assaults on human rights in the history of this country. It is hoped that this discussion will be of service in developing this project further.

NOTES

1. Homelessness and lack of guaranteed medical care in the US is an example. Homelessness is a problem in Britain as well.
2. Waldron (1987) provides an excellent collection of writings with useful discussions.
3. See Marx (1972). For a very good account, see Wood (1980a and 1980b).
4. It is interesting to examine the Namibian constitution in this light. This constitution only incorporates first generation rights (see Fourie, 1990). It might reasonably be asked whether the Namibian constitution is morally acceptable.
5. For further discussion, see Campbell (1983), Macpherson (1977), and Pateman (1970).

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