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24 July 1992

Erika De Wet
Max Planck Institut (Recht)
Berlinerstrasse 48
6900
Heidelberg
GERMANY

Dear Erika

Albie says can you stand it - he has another article on second generation rights. He thinks it is great. He has asked me to send you a copy together with the comments he made to Etienne Mureinik.

Sincerely

SUSAN RABINOWITZ
ASSISTANT TO ALBIE SACHS

Encl:

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20 July 1992

Etienne Mureinik
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Dear Etienne

I think your piece is smashing. I was thrilled to read it. I think we should all swear a self-denying ordinance - no quotes, no footnotes, no references, just straight argument.

In any event I was extremely happy to see how you had grasped the inter-connectedness of all human rights as far as the people we are most in touch with are concerned. Unlike so many of our colleagues who balk at anything outside of their frame of reference and then look for justifications for excluding it, you search for a way to move thinking forward.

As far as I know, no-one in South Africa has developed the argument along the lines that you follow. I am convinced by it, and would like to add a couple of what I consider to be reinforcing considerations.

1. The judicial role can be wider than you indicate. It could establish negative rights in the ordinary way, for example, interdict the unjustified destruction of housing and food, of clinic and schools; it could in certain circumstances require that retrenched employees be given training for new jobs as a condition for retrenchment. Secondly, the validity of administrative acts and subordinate legislation and by-laws could be made dependent on compliance with the relevant principles. Thirdly, a strong right to information could be established in relation to expenditure and the foundations of policy decisions in connection with the Second Generation Rights area.
2. I am not sure that your characterisation of the interaction between Directive Principles and First Generations Rights in India is fully accurate. While it is correct to say that it took a particularly activist and socially conscious Supreme Court to make the rather inventive connections, I do not think that introducing the social dimension in any way weakened the First Generation Rights as such. As I understand it, what happened was that judges of the generation that had fought for Independence (Bhagwati started his legal career late because he was in jail) were so alarmed at the failure of the Legislature and the Executive to fulfill the promise of the Constitution that they began to act themselves.

3. What do you propose doing with your piece? If you are interested in bringing it out in a format similar to that of Hugh Corder's study (copy enclosed), I would be delighted to do it, with or without a preface by myself. You could have, say, 150 copies for distribution at no expense.
4. I think you should explore the rationality principle a bit more. I think the elements of affordability, proportionality and accountability should be seen as ingredients of rationality, that is, we are not dealing with the kind of irrationality or non-rationality involved in non-justified discrimination, but with the irrationality based on disproportionality.

Many thanks and best wishes.

ALBIE