SA

MC H91-11a-1-3

DANNY TITUS
KIEKENDIEFHORST 70
2317 AD LEIDEN
THE NETHERLANDS

COMMENT DEBATE SACHS - BROOKS SAJHR VOL(6) NO1 1990

Introduction:

The views on human rights expressed by Albie Sachs[1] reminded me of an old South African saying, Isiziba siviwa ngodondolo. " The bottom of a pool is reached with a long enough stick," or " we~ll get there in the end."
In our struggle for liberation in SA we have been presented with so many sticks in the past but the bottom of our SA pool has been evading us on every occasion.

In 1910 with the alleged Union we were introduced to a stick being in the grip of Boer and Brit.In 1961 another stick came with a republican flag on it,still in the hands of those classified white and us still standing, staring down at the pool,separated from those country folk wielding it on our behalf.In 1983 new hands were added,they called this stick the new Constitution.

In the process of laying claim to our inalienable human rights, particularly in seeking redress for the violation of those human rights those sticks turned into batons,squirts and sjamboks.We said and still say,throw away your sticks,we have a long enough one, one that will make us reach that pool, one that will make us attain our human rights.

The views propounded by Sachs rescue the SA discussion on human rights from its national(ist) bondage and places it firmly in the context of the international human rights movement,at last.The stick which is indeed long enough.

Before commenting on the international movement and its relevance for SA I feel rather obliged to refer briefly to the ten page article[2] replying to that of Sachs.Whereas it is good sign that the human rights debate is arousing interest from various disciplines it is imperative in this debate to steer a clear course and not to invent the wheel over and over again.[3]

Although one is tempted to respond separately to the many dissonant views of Brooks it is the approach of Sachs that merits the attention.I do however find the words of Mr.Justice Brennan[4] a rather apposite response to the article of Brooks,

---

[1] SAJHR vol.(6) no.1 - 1990,"Towards a Bill of Rights in a Democratic SA."

[2] D.H.M.Brooks,"Albie Sachs on Human Rights in South Africa", SAJHR vol.(6)no.1 - 1990,pp.25-35.

[3] Sachs, ibid. p.5,"...It would be absurd for us in South Africa to have to recapitulate and live through each stage separately before advancing to the next.We do not need to reinvent each formulation."

[4] Delivering the opinion of the Court in the freedom of speech case of New York Times Co. v. Sullivan 376 U.S.254,84 S.Ct.710,11 L.Ed.2d 686 (1964).

> "Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about ~the clearer perception and livelier impression of truth, produced by its collision with error.~" Mill, On Liberty.

The fundamental constitutional problem,according to Sachs[5], is not to set one generation of rights against another, but to harmonize all three.Brooks also finds this problematic but is not so much concerned with the how as with the why.

What is it then that ought to be harmonized and why?

I intend to continue this discussion in the following manner:
i)the development of the human rights idea internationally,
ii)the applicability to South Africa and
iii)why international law and human rights? - UN,peaceful coexistence to interdependence.

<u>i) The development of the human rights idea internationally:</u>

<u>The International Bill of Rights:</u>
The Universal Declaration of Human Rights of 1948 is usually referred to as being the authoritative document on human rights. In fact,the declaration is but one of four stages in the generation of the International Bill of Human Rights.

The four major United Nations legal instruments which exist to define and to guarantee the protection of human rights are:
a.the Universal Declaration of Human Rights of 1948,
b.the International Covenant on Economic, Social and Cultural Rights of 1966,
c.the International Covenant on Civil and Political Rights of 1966 and
d.the Optional Protocol to the latter covenant.

These are the four instruments which constitute the International Bill of Rights and which also represent the four stages of international development of human rights.[6]

a.The Universal Declaration of Human Rights is the basic international statement of the inalienable and inviolable rights of all members of the human family.It is intended to serve as "the common standard of achievement for all peoples and nations" in the effort to secure universal and effective recognition and observance of the rights and freedoms it lists.
It is no legally enforceable document though a strong case can be made for it being part of international customary law. (*****CHECK!!)

b.The two Covenants provide the protection for specified rights and freedoms.They both recognize the rights of peoples to

---

[5] ibid. p.5.

[6] The International Bill of Human Rights, United Nations Centre for Human Rights;Genêve 1988.

self-determination.[7] (of course not the Verwoerdian,South African version).Both have provisions barring all forms of discrimination in the exercise of human rights.And above all, both have the force of law for the countries which ratify them.

i)The Covenant on Economic,Social and Cultural Rights, recognizes the rights of every human person to work and to free choice of employment;to fair wages;to form and join unions;to social security;to adequate standards of living;to freedom from hunger;to health and education.
States which ratify this Covenant acknowledge their responsibility to promote better living conditions for their people. States then report on their progress in the promotion of these rights. These reports are then reviewed by a committee of experts appointed by the Economic and Social Council.[8]

ii) The Covenant on Civil and Political Rights recognizes the right of every human person to life,liberty and security of person; to privacy; to freedom from cruel,inhuman or degrading treatment and from torture;to freedom from slavery;to immunity from arbitrary arrest; to a fair trial;to recognition as a person before the law;to immunity from retroactive sentences;to freedom of thought, conscience and religion; to freedom of opinion and expression;to liberty of movement,including the right to emigrate;to peaceful assembly and to freedom of association.

This Covenant sets up a Human Rights Committee to consider progress reports from states which have ratified the Covenant.The Committee may also hear complaints by such states that other states which have ratified the Covenant have failed in upholding their obligations under the Covenant.[9]

c) The Optional Protocol to the Civil and Political Covenant provides for individuals under certain circumstances to file complaints of human rights violations by ratifying states.

The rights embodied in the above-mentioned documents are the

---

[7] Article 1

1.All peoples have the right of self-determination.By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2.All peoples may, for their own ends,freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation,based upon the principle of mutual benefit,and international law.In no case may a people be deprived of its own means of subsistence.

3.The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories,shall promote the realization of the right of self-determination,and shall respect that right,in conformity with the provisions of the Charter of the United Nations.

[8] vide part iv of the Covenant, articles 16 - 22.

[9] vide part iv of the Covenant, articles 28 - 45.

rights that need to be harmonized in order to give effect to the International Bill of Rights and not particularly because Albie Sachs says so.[10] Those of the Covenant on Civil and Political Rights are called the classical rights of the 18th and 19th century or as Sachs prefers,[11] the First Generation of Human Rights. The Second Generation of Human Rights are then those of the Covenant on Economic,Social and Cultural Rights, (the group rights I would also venture to call them.) ~sociale rechten~ also.

The second point that needs to be made is the content of these rights.
In the discussion on the harmonization I will concentrate on the difference between first generation and second generation rights. The need for the harmonization of the Third Generation of Human Rights will I hope, become clearer along the way.

Difference between first generation and second generation rights:

First generation rights are generally considered to be a relationship between the individual and the state where the state is restricted in its interference into the fundamental rights and freedoms of the individual.
These human rights it is argued,are rights the individual has or ought to have against government.The function of human rights is to protect the individual from the leviathan of the state.As government increases in size and power, government~s capacity to harm individuals - whether deliberately or unthinkingly- increases too,and so the matter of human rights becomes even more important.[12]

Second generation rights on the other hand, demands of the state to interfere in order to create conditions for the development of the human being e.g. housing,employment,education and health care.
The International Covenant on Civil and Political Rights contains the human rights and freedoms which are justiciable and enforceable by the courts. But to what extent does the judiciary have the institutional capacity to formulate and to implement second generation rights? How can an aggrieved approach the court on the grounds that he(she most probably) does not have a house?

Is harmonization at all possible?
Implementation of second generation rights costs money.The Covenant recognizes and accommodates this.The operative article

---

[10] Brooks oddly ascribes third generation rights to Sachs.On p.29 ,"...As for Sachs~ third generation rights, it is not very clear what they are."

[11] ibid. p.4.

[12] Michael J. Perry,The Constitution,the Courts and Human Rights,1982 Yale University,at p.164.

is article 2,[12] and it leaves open the possibility for a gradual achievement of the rights enunciated in it.
But would the judiciary press its institutional capacity,even its legitimate authority,to and perhaps past the breaking point were it to undertake to resolve complex issues of social and economic welfare and, hence, to reallocate scarce and perhaps diminishing fiscal sources?[13]

Albie Sachs[14] apparently choosing to be part of the solution than part of the problem,cautions against restricting the debate to First Generation Rights.Political power cannot be deprived of its content;how can the people have the vote,but not homes and jobs? Or as Adam Small[15] said it:"Djy praat van vriedim,ek praat van vriete!"(" You talk about freedom,I talk about something to fill my stomach!").

That two different types of rights are clearly distinguishable is beyond dispute.That substantially the First Generation Rights request of government to stay out of the lives of the individual and on the other hand to actively involve itself with the implementation with the Second Generation Rights also demarcates the area of application.

Why then try to fuse the two?

Even Brooks[16] has to admit that Sachs argues for the supplementation of a Bill of negative rights (as he,Brooks, calls it) with

---

12 "1. Each State Party to the present Covenant undertakes to take steps,individually and through international assistance and co-operation,especially economic and technical,to the maximum of its available resources,with a view to achieving progressively the full realization of the rights recognized in the present Covenant by al appropriate means, including particularly the adoption of legislative measures.
2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour,sex,language,religion,political or other opinion, national or social origin,property,birth or other status.
3.Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals."

13 Perry, ibid.p.164.
The USA collective commitment to the socio-economic human rights may be regarded with suspicion he concedes, but he underlines their respect to human rights of the political and civil sort as exemplary.

14 ibid. p.5.

15 Joanie Galant , Act ---pp.----

16 ibid. p.29.

second and third generation rights,not for its replacement. Fusing,replacing or rejecting the civil and political rights is clearly not possible if the four stages of development of the International Bill of Rights are taken into account.

It is not the civil and political rights that are out of date,archaic or anachronistic(to use the terminology of Sachs and Brooks).It is the idea to confine the South African human rights debate to the civil and political rights. It is the perspective of trying to reach the bottom of the pool with too short a stick.The perspective of limiting the human rights debate within the boundaries of South Africa,within the four corners of the Act or the four wheels of the oxwagon,the perspective of non-interference in domestic affairs,and perhaps the perspective of the Sinatra doctrine (we~ll do it our way).

The operative word in the Universal Declaration of Human Rights is **universal**, human rights cut across national boundaries,it is international. " A common standard of achievement for all peoples and nations" in the effort to secure universal and effective recognition and observance of the rights and freedoms it lists.

The atrocities of the nazi-regime lead to the major break with the view that only states have jurisdiction as regards the treatment of their subjects.The argument which effectively that "in terms of our sovereignty we can put our Jews in our gas chambers," just could not be maintained anymore.
Through the signing of the Charter of the United Nations in 26 June 1945 civil and political rights made their entrance into public international law.[17]

We have seen and experienced the inhumanity of the two world wars,the Charter says. Never again was the cry.That "never" proved itself a difficult word as human rights today are more observed in its violation than in its respect.(AMNESTY INTERNATIONAL REPORT 1990).

---

17 "We, the peoples of the United Nations, determined --

to save succeeding generations form the scourge of war, which twice in our lifetime has brought untold sorrow to mankind,and

to reaffirm faith in fundamental human rights,in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and

to promote social progress and better standards of life in larger freedom,..."

(From: Preamble of Charter of United Nations)

The South African government is changing its approach on human rights.It is my submission that confining the human rights perspective to the national boundaries of South Africa will not only deprive us of the wealth of experience of other countries but will also leave us sitting amongst the carcasses of the holy cows.
We will just have to tune in to the international perspective of harmonizing the various generations of rights and give content to our human rights.

To harmonize or not to harmonize?

Without entering into the quagmire of definitions it should be clear that the harmonizing of the four elements of the International Bill of Rights will have to give effect to those fundamental human rights which are regarded as indispensable to the development of the individual.

This harmonizing is not so insurmountable an obstacle as the distinction First Generation and Second Generation is in fact not an absolute one[18].There are First Generation Rights which presuppose a duty of non-interference but also First Generation Rights which demand a duty of interference or guarantee from the government.
The right to a fair trial for instance requires well-trained judges,prosecutors,legal representatives and police officials, adequate prison service etc.
The organizing of elections is also not completely without government involvement and also a very costly right of the First Generation.

Then of course are there rights of the Second Generation which demand of the government a duty of non-interference.The right to form a trade union provides us with such an example despite the fact that is embodied in article 8 the Covenant on Economic, Social and Cultural Rights.This is in essence an aspect of the freedoms of association and assembly which belong to the rights of the First Generation. A classic example of the close proximity between First and Second Generation rights.

First Generation Rights lends itself to immediate fulfillment as it is legally enforceable before the courts whereas Second Generation Rights are only to be realised on a long term basis. However,this cannot be maintained without qualification.For,as Henkin[19] admits, although the Second Generation Rights are not constitutional rights in the USA,if the government decides to make available economic and social benefits,invidious discrimination in providing them would be a denial of the equal protection of the laws.

---

[18] Vademecum Mensenrechten,Ministerie Buitenlandse Zaken, ~s-Gravenhage 1987.

[19] Henkin, Rights:American and Human, 79 Colum.L. Rev.405, at 418-419.

The Limburg Principles[20] also state that the equal protection clause in the Covenant requires immediate application.

Harmonizing of the human rights is thus an integral part of giving effect to those rights.

Concluding this discussion on harmonization the age old question of priority needs to be addressed:Are Second Generation Rights the sine qua non for the realization of First Generation Rights or are First Generation Rights the matrix of all the other rights?

The Dutch approach[21] is one of recognizing the equality of both categories,in the sense that a humane existence(menswaardig bestaan) is only possible when both the first as well as the second generation rights are fulfilled.
Someone who is materially well off but who has no political freedom and is defenseless against state interference,cannot enjoy a humane existence.Such a person is in a similar position as those who are formally free but who has employment, no housing and who are starving.[22]
The integrated approach also means that first generation rights are by no means irrelevant to people unemployed, not housed and facing starvation.In fact it will be a particular first generation right that will enable them to publicise their plight viz.the freedom of expression.
The case for harmonizing is established, beyond reasonable doubt, I hope.

ii)the applicability for South Africa:
John Dugard[23] welcomes the State President~s speech of 2 February 1990 as reversing a policy synonymous with the violation of human rights.Albie Sachs[24] although delivering his speech four years before De Klerk articulates some of the suspicions to this apparent change of heart.Brooks[25] couldn~nt believe his eyes that people have suspicions about the introduction of a Bill of

---

20 The Limburg Principles on the Implementation of the International Covenant on Economic,Social and Cultural Rights,1986.

21 Mensenrechtennota of 1979.

22 "Het lijkt weinig vruchtbaar om tegenstellingen tussen de beide categorieën rechten te construeren;men zal zich veeleer moeten richten op een ge-integreerde aanpak." ibid. Mensenrechtennota, 1979.

23 Dugard, SAJHR vol.6 part 1,at (v).
"For the first time a National Party leader has spoken of human rights - instead of state rights and of the duties of the citizen towards the State.At last,a National leader has joined the human rights discourse."

24 ibid. at p.3-4.

25 ibid. pp.25-27.

Rights.After all he proclaims,[26] it does not matter whether a Bill of Rights negotiated,copied,adopted by popular acclaim, etc.What does matter is that it is a good one.Or he could have said,applying the rethoric of the 1983 Constitution,"...They may reject it now but we will convince them later that it is good for them."

Suspicions:
How valid are these suspicions in 1990? After all,the release of Mandela and the other political prisoners is a reality,the unbanning of the liberation movements is not nothing? Surely these talks of distrust and suspicion mongering belong to an era of the past?Rather applaud the new developments, encourage it and please do not throw out the baby with the bathwater.

The developments are certainly to be applauded,the developments on the human rights front also to be encouraged but the struggle for national liberation,the struggle for the attainment of all our fundamental human rights and freedoms just cannot be abandoned because of some steps(courageous though they may be) to normalize the abnormal South African society.The Pharaoh can never be the leader of the Exodus.

A little emotional? Too much soapbox? Perhaps.Perhaps not.

The De Klerk speech on human rights centers largely on the activities of the Law Commission, its provisional report and the extension of its terms of reference.Whereas the scholarly report is commended for its compilation and articulation of human rights concepts in terms of the South African legal order it is hoped that, with its extended terms of reference,it will plug into the development internationally, e.g.considering the effect of the international treaties on our domestic legal order.

The Law Commission and its terms of reference however,is also an indication of the deeprooted suspicions.For instance,on the 23 April 1986 the government through its Minister of Justice Coetsee instructed the South African Law Commission to investigate the feasibility of affording constitutional protection to group rights and to consider the extension of the existing protection of individual rights and the role the courts could play in this regard.[27]
What could have motivated the government to issue such instructions? Surely not a sudden attack of respect for fundamental human rights and freedoms.This was after all the period of the lifting of the ~85 State of Emergency and the imposition of the 1986 State of Emergency.A period in which regulations promulgated in terms of the Public Safety Act and brought into effect on 12 June 1986 laid the basis for the most drastic erosion of civil liberties in South Africa; when the ~law~ was taken out of law and order and information on political developments and police conduct placed under state management.[28]

---

[26] ibis. p.31.

[27] South African Law Commission,Working Paper 25,Project 58:Group and Human Rights, 1989 at p.1.

[28] SAJHR vol 2 part 2 July 1986,at 252.

Staying with first generation rights[29] for the moment,the question is whether the government is finally realizing that it has increased in size and power, so much so that its capacity to harm individuals increased too? And that it is in dire need of being restrained?[30]

How can these questions be answered in the affirmative when the commission the government appointed to investigate human rights did their investigations and deliberations when their instructor was devouring every possible human right standing in its way.

Perhaps the article of Prof.Nic Wiehahn in Rapport (1988 Dec.?) about perceptiology can provide the key.That it is not so much the content but the perception that counts.Don~t talk about separate democracies but rather of respect for human rights.

Suspicions over the sudden interest in human rights from the side of the oppressor will definitely not wither away that easily.The Law Commission may have produced a courageous report and it may certainly produce a final report of even better standing.The fact remains that the Law Commission is not the government and the record of the government regarding the recommendations of its commissions is clearly not a shining one.

Further planning:
Dugard and international law - two articles.

Wiehahn(Rapport article)

De Klerk - human rights in his speech

Law Commission little response to international movement

Concentrate on First Generation - culture of human rights,not so much for courts but also for police(freedom of assembly,speech etc. prisons,hospitals,dept.justice,magistrates bail(beskuldigde die hooflanddros wil hê die landdros moet nou ~n ander hof gaan doen,maar as die hof weer terugkom sal daar moontlik vir jou borg wees, commissioners courts(moet ek daai vraag beantwoord edelagbare? etc.Kort die magbeheptheid in (leviathan of the state)

Blankes en Franse Rewolusie (dra alle mag aan Staat oor; die sal

---

29 note 12 supra.

30 Donner, A.M.,~De ontwikkeling van het democratisch denken~,in: Thomassen (red.),J.J.A.,Democratie,theorie en praktijk 1981,p.43.
"Het is niet te kras om te seggen:Zij moeten tegen zichzelf en hun opwellingen en bevliegingen worden beschermd..."