



A Curated Conspectus of the Life, Love, Law,
Literature and Laughter of Albie Sachs

THE GROOTBOOM CASE – PART 1 – VIDEO TRANSCRIPT

CHAPTER: WHERE LAW AND POLITICAL ECONOMICS COLLIDE

THANDI MATTHEWS

In terms of socio-economic rights, there are two qualifications, progressive realization within available resources. One of the criticisms that have been levelled against our political economy, broadly, is that we don't know what our available resources are. *Is it the role of the judiciary to dictate to the state what its resources ought to be?* That is very contested also against progressive economists, who also make the argument that something that economics doesn't have in its ~~in its~~ mainstream approach is the concept of dignity, and that if we try to incorporate dignity into the practice of economics, it would then compel the state to constantly make available its available resources to its maximum, as per International law. What is the role of the law when it comes to the practice of economics. Who gets to decide what our available resources are?

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Well, this is all now fresh terrain. The judicial review and judicial thinking that came originally from England and afterwards from the U.S. and then from India and other countries, had a lot of stuff on freedom, much later, material on equality, but very little on socio-economic rights. That was all left to parliament, the political debate and so on. Now, suddenly judges are not only being told you can, but you must uphold the rights. And it's understood you can't just go to court and say, *'I want a place in this school. I want a bed in the hospital, I want a house. It says so in the Constitution.'*

CHAPTER: PROGRESSIVE REALISATION

The Constitution, following on the International Economic and Social Rights Convention adopted at the UN, included the idea of progressive realization. You don't want it all immediately. You progressively realize within available resources. It takes account of the potential. These are very, very broad statements. Now there's a growing, movement amongst, critical human rights lawyers to say

we've got to give meaning to those words. You can't just leave it to government to decide 'progressive'. The courts have got to step up and provide pointers.

And if you're wasting a huge amount of money on this rubbish and that rubbish is that a violation of the right to health when the money could be better spent? And then what are the available resources? Is it just the budget that you look at or are there other factors? We never got into those realms when we were starting. We took the actual cases as they came to us. Very, very concrete, specific.

CHAPTER: THIS IS IT! THE CASE

The first big case, the real test now. Grootboom, we knew *'this is it.'* Mrs Grootboom and a thousand others couldn't bear the winter rains coming, flooding out their shacks where they were living. So, they dismantled the shacks. They move to a nearby hillside, reconstruct, and they discover that area has been set aside for low-cost housing. There's mediation. Tried, it fails. More transfer. They're evicted. But brutally evicted. They end up with their little pieces of cardboard and corrugated iron and wood on a sports field. Open. And they want a house, they want shelter, they want protection.

I'm reading the papers, I'm thinking of Mrs Grootboom lying there with the two children, the rain clouds overhead and moonlit sky. And she's thinking, *'Why, why, why, why? I've done nothing wrong. All I want is a place for me and my kids to have a roof over, that's all and here we are sleeping out in the open.'* And I'm thinking there are a million billion, Mrs Grootbooms throughout the world, in different continents and countries sleeping out in the open like that, asking why. But I'm a judge and it's *'how, how can we respond?'* We are judges, we don't know about housing and how can the *'why?'* of Mrs Grootboom meet the *'how?'* of a judge? A local attorney takes the matter to court. Says, *'The Constitution says everybody has the right of access to adequate housing. Please provide something.'* The matter comes before Justice Dennis Davis. They make an arrangement. Temporary accommodation will be provided. She got what she wanted. That's what she wanted. She's now in the queue for permanent housing. All she wanted was something temporary, pending eventually reaching the stage where she's given the key of the door. And he didn't want to just have to decide the case looking at the weather reports under that pressure, and he came up with quite an ingenious argument.

He said *'a third of the people out in the open or more are children, and children have rights to shelter. It's not qualified by progressive realisation. So, I'm ordering that they be given shelter. It's already been agreed to. And since you can't separate children from their parents, the parents come in with them.'* So, the case is taken on appeal to the Constitutional Court. Nobody's happy with that decision.

The state feels it's an indirect backdoor method of putting her high up on the queue, to get support from the state. The human rights people are saying, *'We don't want justice because of the children. She has a right. They all have rights.'* And we heard very good arguments. It was impressive. Counsel for the government saying, you know, these are poignant, hard situations and we want to help the Court as much as possible to get the right approach to matters of this kind. It wasn't a belligerent, defensive sort of thing at all. The Legal Resources Centre played a very big role, and it was a Geoffrey Budlender who came in. And it's one of those cases where he swung the debate, changing the argument.

CHAPTER: DIGNITY AND THE DILEMMA

We had good counsel for Mrs Grootboom. Very experienced counsel. Peter Houdes. And he more or less said, *'My client is sleeping out in the open. The rains are coming. The Constitution says she has a right to adequate housing.'* He could have just sat down there. That's it. He didn't develop it. And all the time there's a tension between, we Judges. We don't know about housing. We don't know about how much things cost. We don't know about priorities. These are issues that are left to government, to parliament and others to decide. And we shouldn't be drawn into that... a strong pull in that direction. The pull the other way is these are human beings. They are being afflicted now by an atrocious environment without protection and shelter. And the dignity factor played a very, very big role because they're being plunged below a level of... it's not even acceptable. ~~but it's~~ You've got to live with a huge amount of inequality in the country.

But you need programs to deal with that. The courts don't intervene. It's not the job of the courts to systematically transform South Africa. So, the extremely powerful emotion of the vulnerability of those families; and it's sensible for counsel to bring a case with a woman-headed family, [with] little kids, so that the courts can empathise. The outcome doesn't depend upon that, but it establishes a tonality, a register, a reminder. And it's not, sadly, an exotic or unusual situation. It's a very usual situation. And we argue around the table.

CHAPTER: FEELING AND BRAVURA. THE JUDGMENT.

Zak Yacoob is asked to write the judgment for the Court. It actually was a brilliant choice. Zak, blind since the age of 15 months, he worked in the underground. There used to be stories about Zak being driven to a meeting somewhere and he'd say, *'Hey comrades, we've taken the wrong turn.'* He could tell just from the sound of the wheels. Quite legendary, you know, this blind person who could feel and see. Very involved in community organizations from a poor background himself. And then he worked on the writing of the Constitution. And he had the expansiveness. This wasn't just a technical

judgment. It wasn't just *how do the words correlate to be interpreted in a way that would produce results*. It was a judgment that had to be written with a certain bravura, with the feeling, with a connection with millions of people living in squalid conditions. How can they be assisted, without at the same time promising? That's something we always have to emphasise.

The sustainability of the measures is part and parcel of the constitutionality. And so, Zak is aware of that and he's not just an idealist from outside rebuking everybody and demanding the highest standards, even if they're not as sustainable. So, he writes with bravura the Grootboom Case, and we're all invited to contribute. I remember saying, this is a case. *'It's not just*

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socio-economic rights, it's a gender question.' And then Pius saying, *'And it's a race question.'* The people sleeping out in the open are not white people, by and large. So, it's superimposed upon, the inequalities and the dignity aspect. And ultimately the dignity aspect was crucial. It's when the failure of the state to act - in this case after it, the state itself, had evicted the people - plunges the people to a level below what dignity demands as the minimum. It's not a minimum core of rights.

It's a minimum level of dignity. Sleeping out in the open, that's just too much.

CHAPTER: REASONABLENESS WITHIN AVAILABLE RESOURCES

So, we decided in the end, that there was a very good housing programme. The state then, I think it produced maybe a couple of hundred thousand homes, given free, with water, electricity, sewage; given free to the people. By international standards this was spectacular. They were saying within our available resources, we've done what's required. End of the matter. And she's still in the queue and she'd just have to wait a bit longer. And the Court said *'No.'* We used the word reasonable. Reasonable is contextual, is proportionate. And the part that's unreasonable is you're building these houses, you're establishing queues, that's fine.

But what about people in extremely desperate circumstances, victims of fire and flood, evictions, like Mrs. Grootboom? And that part was unreasonable. So, the state must now find resources to provide for temporary accommodation. We were a bit uncomfortable with that. In the apartheid era, there were massive evictions. Black people on land said to be for whites. It was forms of control and they'd be pushed into temporary accommodation.

But the mere fact that temporary accommodation was used in the apartheid era to perfect apartheid didn't mean we couldn't require temporary accommodation in this case. It's amazing how

well the Grootboom Case has stood up. People working in that area say that they come back to it time and time and time again.

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