



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

THE AZAPO CASE – VIDEO TRANSCRIPT

CHAPTER: LAW AND WAR

JUSTICE ALBIE SACHS

Law and War. We had three cases. By their very nature they're incompatible. But the law doesn't stop when war begins, and war has consequences for law afterwards. And this is very profound in South Africa, because we've had centuries of colonial dispossession, and conquests, and rebellions, and it was harsh-- armed struggle for national liberation.

Finally, peace. Constitution negotiated. We're not going to settle our issues anymore through firearms, guns, the torch, massive power, but through elected representatives speaking on behalf of the people in constitutional instruments. Wow, huge change! And it brings democracy, and it brings nationality. We became a people for the first time, through elections. But there's still... What to do about the war, the ugly conflicts, the things that happened in the apartheid era, that were just so unconscionable?

Even under the ruthless white supremacy government, they were unlawful. Torture was never formally allowed; assassination was never formally allowed. These things had been going on. What to do about that? And on the side that I was involved in, those days in the ANC in exile, it turned out terrible things were done in the camps that we had in Angola. And I'd actually been involved in the drafting of a Code of Conduct to prevent torture and abuse of captured enemy agents. It's actually my proudest legal work of everything. More, even, than helping write the Constitution, writing the same-sex judgment. I'm proud of having been involved in those aspects. But this was inside the struggle, introducing concepts of legality, of fairness and justice, even for people who've done terrible things, aiming to destroy us, to blow us up.

Eventually, in 1993, the Constitution is adopted. We're going to get elections. There's a crisis. The generals say they were promised amnesty by President De Klerk, but there was no amnesty in the text. And I was actually sent a fax, I was in London at the time, an indication from the ANC headquarters - it looked like Mandela was behind it – that there was some sympathy for the

generals, that they would have to bear the burden of what the politicians had been doing, and that they were now defending democracy, which was very important.

They knew of campaigns to smash the elections with bomb blasts and so on, and they would defend the elections. But not if they were going to go to jail afterwards. They said, '*...we would just leave, we're not threatening a coup, we would just leave...*'

CHAPTER: A TRUTH COMMISSION FOR EVERYBODY

So, I remember turning over that fax and writing at the back: The ANC has already proposed internally, through its National Executive Committee, to have a Truth Commission to examine its own violations of human rights in the camps in Angola. Let's have a Truth Commission for everybody on all sides. Not just on our side. And the generals could get amnesty if they came forward and acknowledge what they've done.

And that proposal was taken up and it ended up with a beautiful, we call it a post-amble, in the Constitution, in kind of a poetic language, that we acknowledge the untold hardships, crimes, and injustices of the past, but we respond to them, not in a spirit of vengeance and retaliation, but in a spirit of Ubuntu and reconciliation.

Very poetic words, not with precise legal meanings, but establishing a tonality, a spirit, a set of relationships. And Parliament will be authorised to establish mechanisms to enable the crimes of the past to be dealt with in a way like that, that would grant amnesty for people involved on all sides.

CHAPTER: TRUTH AND RECONCILIATION

One of the first major pieces of legislation in the new democratic South Africa was the Truth and Reconciliation Act, which my old friend and colleague, Dullah Omar, who was the Minister of Justice, ... and he told me, he said, '*...you know, Albie*' ... I wasn't a Judge then, so we could still chat, that he spent more time on that than on any other part of his task of reconstructing the judiciary, creating a new constitutional service... '*it was hard.*' It was hard to get the security forces on board. It was hard to establish the mechanisms. It was hard to find the people. You had to have honourable and true people who were passionate about humanity and human rights, but completely impartial in the application. So eventually the Act is passed, by a very big majority in Parliament.

At that stage, an organisation called the AZAPO, they had been boycotting the negotiations, saying that negotiations are a sell-out to white supremacy. The negotiators are saying, we're actually destroying the power of white supremacy through negotiations, through democracy, through the vote, through the voice of the people being heard, through different points of view.

CHAPTER: ATROCITIES, AMNESTY AND THE POLITICAL STRUGGLE

In any event, that distinction carried through to the TRC, Truth and Reconciliation Act, as we called it, and the Act said, that people in the security forces, on the ANC side, from wherever, who had violated the law, who had violated rights, could come before the Truth Commission. And if they told the truth of what they'd done, there would be a section of the Truth Commission that could grant them and would grant them amnesty.

They had to tell the truth, all the truth, and nothing but the truth. They had to show that what they did was in the course of the struggle, whether to defend apartheid or to overthrow apartheid. So, bank robbers, for example, who said, *'We black people, we stole from the whites to distribute to our people'*, they didn't get it because it wasn't sufficiently political. And the great majority of applicants, in fact, were people of that kind, who didn't make it.

But there were some thousands of people who had committed, who'd done atrocious things, in the course of the political struggle. And they came to the Truth Commission. Many of them applied for amnesty. It wasn't always granted. The killers of Chris Hani didn't get it, because they didn't tell the whole truth. The killers of Steve Biko also didn't tell the whole truth. They didn't get amnesty.

CHAPTER: HEARING THE AZAPO CASE

And AZAPO object. They say, *'Okay, the balance being struck by Parliament is if you tell the truth, you get amnesty, and maybe, maybe, maybe, we won't fight you on this. That can be enough to give them indemnity from prosecution. Otherwise they won't come forward. Otherwise, you won't discover the bodies. Otherwise, you won't know the last moments of people who died.'*

But the Constitution says, *everybody has a right to have their disputes settled in a court.* A very fundamental right, and that's been taken away by this Act. And so civil liability has to continue. Even if can't send them to jail, you can sue them and you can sue the authorities for damages for the loss.

And the case that they brought, I remember, it was about a Dr Fabian Ribeiro, a very brave Black Consciousness person who'd been associated with AZAPO, murdered, assassinated by hit squads. And this little Court chamber, you know, is packed with people. And there is sort of a proximity there, you can't have people on this side sitting on this side and the others sitting on that side. We're all like shoulder to shoulder. The Judges also, very, very close, not quite as close as I am to you, but pretty close. It was quite an emotional hearing, understandably.

An argument presented by David Soggot who for years had defended people, often with very little remuneration under the apartheid laws, going out into the countryside; he'd done that... and a

dogged fighter. And the issue then, is we come and sit around the table, afterwards, we haven't discussed the case

CHAPTER: HOW DO WE RESPOND?

... How do we respond? There are no clear words in the Constitution on this. There are no strong direct pointers. It's how you are assessing the whole theme of reconciliation, in the framework of a constitution that's transforming our country, from not only a racist but an authoritarian, dictatorial kind of society, into an open and more generous and caring society. I know my colleagues were very interested in my response, you know, clearly because, I'd been blown up by a bomb and lost an arm, and I indicated that I was fully in support of the Truth Commission process, that the country must know what happened, so that things don't happen like that again, and that we've just got to learn to live together in meaningful ways, subject to common rules of ethics and values and so on. And I think maybe, my colleagues felt comforted that I wasn't saying - I don't want to use a nasty word - but they did terrible things, they deserve what they get, and they shouldn't be shielded by any law of this kind. I actually felt strongly about it.

CHAPTER: TRANSCENDENCE THROUGH RESTORATIVE JUSTICE

The restorative justice aspect is powerful. It's not being nice or kind. It's not even forgiveness in the religious sense. That was very important for Archbishop Desmond Tutu, the religious dimension of forgiveness. It wasn't that for me, it was a transcendence. It was helping to lift our country from the terrain of just smiting and bashing and hatred and conflict to a totally different set of relationships and culture. And this demanded something of the people concerned. They had to come forward and acknowledge what they'd done, and be punished by shame, if you like. I would imagine the wife of a guy, wondering *'all that time I thought he was out sleeping with his lover'* and almost a sense of relief, maybe horror, that *'he was torturing somebody instead, and he couldn't tell me...'*

I don't know. but these are complex sort of things, and it's not easy, you don't just stand up and talk, talk, talk, talk, and your children know this is what you've done, and the world knows what you've done. You are paying a price. You've also been defeated. The things you defended are being knocked down, the country's moving forward. It was abysmal. You were doing it for what? Defending the indefensible. So, I personally had no objections.

CHAPTER: THE SOUL OF SOUTH AFRICA

For me, what was remarkable in that case was the judgment by Ismail Mahomed. I remember receiving it, in those cyclostyled paper, quite heavy. I've never read a judgment so poetic in feeling. And the poetry related to the themes. This wasn't a judgment that had to turn on the meaning of

words and the technical things and legal tradition. It dealt with the soul of South Africa. It had to. And Ismail, in that respect was more spectacular than any of us. For sheer brilliance, virtuoso in the best sense of the word, virtuoso use of language to convey legal thought, I think the AZAPO case is without parallel. And he spoke about the nature of truth being hidden in the crevices of our history, and it's got a feeling sort of running through.

CHAPTER: A PRINCIPLED LEGAL FOUNDATION

And it also had a very strong, principled legal foundation. And the question was, did parliament have the authority of the Constitution to grant amnesties from both civil liability and criminal prosecutions? That's a legal question. And he looked at the text of the postamble, he looked at the situation in which the country was, and he said that, *'...that was an agonising choice that Parliament had to make...'*

He starts off with the agonising choice. *'The choice would be to allow criminals to walk free in the streets. People who have done horrible things...'* He poses that question and he says *'...that was for Parliament to decide. We're not saying it's good. We're not saying it's bad. We're not saying it's the best thing or the worst thing. We're just saying it was their choice. The democratically elected parliament coming down in favour of this whole process...'*

And in terms of the integrity of the process, he would have known that people like Dullah Omar who had been in prison himself, who'd been in the struggle; not trying to satisfy anybody or be nice, but thinking this is what the country needs. The text of the arrangements made. The capacity to have people like Archbishop Desmond Tutu, who had been strongly in the trenches against apartheid, but not within any particular liberation movement structure, involved in it, there were various other people involved in it. He said, *'okay.'*

So, it was a memorable judgment and I again felt so proud of our Court and of the richness of life experience of our judges, that one of our judges could come out with those statements that were beautiful. Beautiful, not because there are nice adjectives about beauty in it, but the clarity of the thought, and its relationship to living in a new constitutional order, was so profound.

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