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

THE DU PLESSIS CASE – VIDEO TRANSCRIPT

CHAPTER: DISTINGUISHING BETWEEN HORIZONTAL AND VERTICAL APPLICATION

THANDI MATTHEWS

A unique feature in the South African Constitution is that it has a provision that permits horizontal application of the Constitution. And in the Du Plessis Case, you dealt with the distinction between the vertical and horizontal application of the Constitution and distinguishing between the functions of Parliament and the Judiciary.

Could you please speak to us a bit about that case?

JUSTICE ALBIE SACHS

Okay. Let me explain this horizontal and vertical application. It was a huge issue in the academic world at the time of change, and our people who had studied in the United States, came back saying, *'Whatever you do, don't follow the American Supreme Court approach, that says the Constitution only relates to the relationship between the State, the Government, and the individual, it doesn't deal with private matters, whatsoever. The whole private sphere is outside the realm of constitutional investigation.'* And others said, *'What, you mean racial slurs and oppression and division and so on can continue as long as it's in the private sphere?'*

So, we had to decide, I forget what the particular facts of that case were, I think it was a defamation action - defamation is part of the common law. The State wasn't involved. Can constitutional values be brought to bear at all?

And I was saying, in effect, we don't want a purely vertical relationship between the state and the citizens governing constitutional rights. The impact of the inequalities, the injustices, exploitation, is very wide. It's pervasive, it's throughout the whole of our society. And what we have to do then, is to use the instruments that the Constitution gives to Parliament through legislation, through the courts, through interpreting legislation, in a way that's going to further change, and through the courts in

the way that customary law - which had a very powerful patriarchal element embedded into it by the white magistrates, basically of the colonial apartheid era -- how that could be developed. And basically, I was arguing for what I call a diagonal application. It's not a choice between the two -- a diagonal. And effectively that's what's happened since then.

Our courts are much more interventionist than courts in the United States and elsewhere because all legislation has to be interpreted and applied in a way that furthers constitutional values. If it doesn't do that, as long as the language is capable of sustaining, even with a stretch, the meaning we want, it will do that. It's been very dramatic in relation to customary law, where the theory / concept of living customary law that insists on equality for African women as a fundamental aspect of our non-sexist society, but not outside of customary law - as part and parcel of developing customary law, that's the way that we've gone. So, I found myself in a curious position. Lovely judgment by Sydney Kentridge, and a lovely judgment by somebody else, each arguing from a different point of departure, and I was like agreeing with both, although they expressed things differently. And I came up with that formulation.

CHAPTER: DIKASTOCRACY – WITH A BIG SMILE ON MY FACE

Now I used the word *dikastocracy* with a big smile on my face. Sometimes even doing the most serious work in the most senior, weighty court in the country you can have a little bit of linguistic fun. And having once upon a time, long, long, long ago, being quite a good classical culture student, and getting good marks for it, I objected to the term *juristocracy* - *jurist* from the Latin, *ocracy* from the Greeks. So it's mixing two languages, and either both Latin or both Greek. So, I phoned my friend George Bizos - Greek born, wonderful advocate - and I said, *'George, what is the Greek word for judge?'* And he said, *'dikas.'* So, I decided I can't speak about a *dikocracy* - and I've never seen Sydney Kentridge giggle, I think, in my life, he's such a contained person, his amusement is contained, it's very lovely - but he almost guffawed when I used that phrase. So, I called it *dikastocracy*, and that was just a little bit of private fun.

CHAPTER: THE JOB OF THE COURT

But the theme there was to say it's not the job of the Court to right all the wrongs in society. It's not the job of the Court, to rewrite all the laws of the country. It's not the job of the Court to transform the whole legal system by its own initiative in terms of what it thinks is right for the country. And there are sound practical reasons. The people are not involved in that way, in the same way Parliamentary processes have public participation, and there's a lot of give and take, and compromises, and financial implications have to be looked at, and balancing out competing interests,

and implementation. Legislation is hard and it's not for us sitting in our chambers to start inventing solutions to all the problems of the country. Now, this is fairly early on. We've got our first black government in South Africa, elected by the people, and the government of people who fought for freedom, with freedom in their hearts and their minds.

And the idea of us sitting up in Braamfontein in our green gowns knowing better than Parliament, deciding things for Parliament, I was a bit disturbed by that and I felt there was a certain, if you like, scholarly conceit or arrogance involved that we're lawyers, if only the world would listen to us, everything would be fine. But it's a balanced kind of representation.

CHAPTER: INCLUSION OF HORIZONTAL APPLICATION IN THE FINAL CONSTITUTION

And as you pointed out, in the end, when the final Constitution was passed, it expressly said, there could be horizontal application, in circumstances where it was suitable. It didn't say what they were, so it opened up the possibility without insisting on it. And my argument then was, it was for the Human Rights Commission, Commission for Gender Equality and others to take the initiatives, to inquire into areas of abuse and injustices in our society, refer the matters to Parliament, not for the Judges to go out of their way to try and change the law wherever possible. I got castigated as deferential, on the side of government, not to interfere, and all the rest. I'd like to think it was a more nuanced approach than simply the classification *which side are you on?*

THANDI MATTHEWS

Well, for me, the way I interpret horizontal application now is that irrespective of who you are, irrespective of whether you are corporate entity or private person, all of us are bound by the values of the Constitution, and that should be your guiding framework in terms of how we act in society.

CHAPTER: DON'T RUSH IN

JUSTICE ALBIE SACHS

And I made that point, but the point wasn't the principle, it's the remedy, and who can intervene and who can take action? And will it be the people with the money who can go to court, and who will have their case rights vindicated, and sometimes will it be judges seeking popularity, issuing judgments that are incapable of being managed, and you're taking money away from other budgets, education and everything else that that's needed.

So, don't rush in, you know, that was my feeling. Don't rush in. I tended, as it turned out, to be one of the more, if you like, activist judges. I tended over the years, I think, to be more robust in holding

Government to account than most of my colleagues, and sometimes very much so. But that was on the issues in the particular case, it wasn't based on some principle that we must be the vanguard.

THANDI MATTHEWS

Thank you, Judge.

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