



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

THE FOURIE CASE – VIDEO TRANSCRIPT

CHAPTER: THE RIGHT OF SAME-SEX COUPLES TO MARRY

JUSTICE ALBIE SACHS

I'd like to conclude the discussion today with what I found [to be] one of the hardest tasks I had on the Constitutional Court. It was in the Fourie Case-- same-sex marriages. It wasn't difficult declaring on behalf of the Court, acting under the Constitution, that same-sex couples had the same right, exactly the same right, as heterosexual couples to have their marriages recognised as marriages by the law. The part that was difficult was to present that outcome in a way that it didn't look like part of a cultural war. *'We, the enlightened, you the benighted, and we are standing up for enlightenment against you bigoted people who are homophobes and backward.'*

CHAPTER: COEXISTENCE BETWEEN THE SACRED AND THE SECULAR

That war goes on, it's very, very destructive. And I wanted to find a way of avoiding the pitch battle between the combatants in that war, by speaking about not the war between the sacred and the secular, but coexistence between the sacred and the secular. And to guarantee the fundamental rights of same-sex couples in an unqualified way to express their love and commitment to each other, and mutual responsibilities - clearly, unequivocally - but at the same time, not to make religious believers, who have a different outlook, feel *'we've lost, we've been smitten, now we've got to fight back'* and find a way of fighting back.

CHAPTER: CHANGING THE DISCOURSE

That's what's happened in the United States. And it ends up in arguments about bakers refusing to bake a cake for a wedding that shows two men or two women, and the whole country gets in uproar about that. It's a case about a woman who refuses to perform a same-sex marriage. It's about that. It's litigating, it's fighting, it's increasing tensions, and *'if you lose, the other side wins. If they lose, you win.'*

I wanted to change the discourse and I wanted to write a decision that firmly upheld the rights of same-sex couples to express their love, commitment, and responsibilities for each other in an unqualified way, equal to that of heterosexual couples. And let people in the religious community, who have completely different views, know that their views had been listened to and had been heard. The same Constitution that protects the rights of same-sex couples to publicly get acknowledgement of their relationships, protects the rights of people who have other beliefs not to be compelled to go against their beliefs. The Constitution covers both, but in different ways.

CHAPTER: THE IDEA OF CO-EXISTENCE

The idea of coexistence came to me from the workshop I attended in Colorado, Aspen Institute, chaired by the author of the *Roe versus Wade* decision, Harry Blackman. It was the end of the series. Auditors longed to be there to hear him. He was their hero. And he explains how he came round to that decision. We have a discussion and everybody's feeling the glow. And his physician speaks - his personal physician - his personal physician says, *'I'm a Catholic. I don't believe in abortion. I don't believe in abortion. But I don't believe my opposition to abortion should be imposed upon people who have other beliefs.'* That was his answer. People were trying to persuade him *'...but the argument!'*. He said, *'Don't try and persuade me. I'm not going to change my views. I think life begins with fertilisation - that's my views - but I'm not insisting my views be imposed upon the others.'* In a sense, what he was saying became the foundation of my judgment, and writing it for people like him in South Africa. And there are strong passages on the meaning of religion for people in public life. Not just something you can do in private - you can pray and worship in your communities - it's part and parcel of the nature of [being] South African; the timbre of South Africa. We all sing *Nkosi Sikelel iAfrika* and it's so meaningful to millions... and they're the majority. I'm not the majority.

CHAPTER: THE COURT CAN'T BECOME INTERPRETERS OF SCRIPTURE

Religion has inspired people to do horrible things. [And] It inspired people to support human rights for music, for art, for culture, for education... for so many different things. All of that is spelt out in the judgment. And I can say that because I'm secular. I'm not pushing for a sectarian worldview. I'm not proselytising about the role of religion in public life and the meaning for millions of South Africans. And I think it had significance. I even said in terms of advocate Smythe, who was quoting scripture, I said, *'There's no doubting the sincerity of his beliefs. But how can the courts now become interpreters of scripture?'* The religious leaders fight amongst themselves about how to interpret the holy words. Imagine if judges are now interpreting scripture. We have to keep out of that. We have to keep out of that. We can't base our decisions on scripture.

CHAPTER: MARCHING, MEETING, DILEMMAS AND DIVERSITY

Sometime later, my book comes out, *Strange Alchemy of Life and Law*. There's a whole chapter on how I marched with gay rights marchers in Cape Town. I'm all embarrassed. I want a sign to say, '*Straights for gays*', then I'm cross with myself for wanting that sign and I feel very proud marching next to Edwin Cameron, for people fighting for their rights.

Ten years later, I'm at a meeting of Christian Lawyers for Africa. Court's on recess... I'm the only Judge around. Pius Langa sends me to go there, and they love hearing my story about the dilemma I had when it came to taking the Oath, and do I affirm, which I wanted to do. [But] I wanted to raise my right arm to swear because my right arm was the arm of sacrifice - that was my source of my honour and integrity. So, I raised my right arm and said, '*So help me God.*' And I think they'll be cross with me for using the name of God for an instrumental reason. They rush up afterwards, and the next day I take them on a tour of Constitution Hill and the Constitutional Court. And I'm late for a meeting at the Women's Jail and I'm speaking too much like I tend to do from time to time. I'm about to rush off and they say, '*...no, we must say a prayer.*' Now, some prayers are very quick, some go around the world a few times... this went around the world a few times... and now I'm about to rush off. They say, '*...we must lay on hands.*' Seventy pairs of believing hands on my secular body. But they gave it with love, I received it with love.

CHAPTER: THE RIGHT TO BE WHO YOU ARE

Now, these things are not consciously in my head, but I'm writing and I'm thinking, these are all our people in their diversity. I've got to uphold the fundamental rights of people to be who they are, and to get out of the centuries of marginalization and disrespect, and to be full human beings, without a doubt, but acknowledge there are other people who see the world completely differently. So I deal with the coexistence of the sacred and the secular. They don't fight each other. They occupy different spheres.

CHAPTER: A SOLOMONIAN JUDGMENT

And I was so thrilled when the South African Council of Churches called it a Solomonian judgment. My dad was Solly - he would've been very pleased. But they felt listened to. They felt it was like a fair and balanced judgment.

My judgment was criticised as falling over backwards to placate the heteronormative community. Maybe it's legitimate criticism, but it's not wrong to do that. And it's not to placate that community,

it's to get greater protection for the rights of gay and lesbian couples, which it did. The outcome has been very positive.

When a week after the law had been passed, I'm driving to Kirstenbosch to attend a wedding and I'm looking for the sign – and you know Kirstenbosch, you can't get more bourgeois and respectable and correct than that - and I see, *'To Amy and Jean's marriage.'* I felt so beautiful inside. So simple: Amy and Jean's marriage.

CHAPTER: 'TO AMY AND JEAN'S MARRIAGE'

If we've done nothing else on the Court - and we've done lots else - we've helped to now regularise, mainstream, the lives of people who've been subjected to absolutely intolerable, unfair, unjust, cruel marginalisation. That's something that the courts can do, and the courts do, and certainly the South African court has been doing.

THANDI MATTHEWS

Thank you.

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