



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

THE BOTHMA CASE – VIDEO TRANSCRIPT

CHAPTER: THE SUBTLE MASKS THAT RACIAL AND GENDER OPPRESSION MAY DON

THANDI MATTHEWS

I wanted to move on to the issue of gender. Something that I found very profound in your judgment is how you demonstrate how the law reproduces systems of oppression. Patriarchy is one of them. We've just spoken about racism. In one of your judgments, you write, *'The Constitutional Court has stressed the importance of recognising patterns of systemic disadvantage in our society when endeavouring to achieve substantive and not just formal equality. The need to take account of this context is as important in the area of gender as it is in connection with race. It is frequently more difficult to do so because of its hidden nature. For all the subtle masks that racism may don, it can usually be exposed more easily than sexism and patriarchy, which are so ancient, all-pervasive and incorporated into the practices of daily life as to appear socially and culturally normal and legally invisible'*.

The first case to do with gender was in Harksen. Could you speak more to that case, and how it is that you were able to expose how patriarchy was so embedded in the apartheid regime, and how that oppression could be addressed through the law?

CHAPTER: THE PATRIARCHAL NATURE OF INSOLVENCY LAW

JUSTICE ALBIE SACHS

I can do that and also show how I lost my argument. I was in the minority. Harksen was a crook; it was clear he was a crook. He was from Germany, he was wanted by the German government, and he swindled South Africans. Some of the evidence showed he was insolvent, and the case turned on the Insolvency Act. His wife was the applicant because Harksen had given some diamonds to his wife, which she put, I think, in some shoes in her locker at the sports club she belonged to. The people trying to recoup his ill gains wanted to seize something that now belonged to his wife. But the

insolvency law said - that's the bankruptcy law - said that in the case of spouses, if the husband is insolvent, the wife's property automatically becomes part of the estate, and she has to reclaim it as really belonging to her, and not as though it's being hidden with her to keep it out of the hands of creditors. Many writers on insolvency law just assumed that this is clearly patriarchal and clearly unconstitutional. Maybe the property could be seized temporarily to determine who the ownership was, but there shouldn't be a presumption that it was his property.

CHAPTER: THE CONCEPT OF PROPORTIONALITY

Now the Harksen Case became well known in our law, not for the facts, but because we were trying to explain to the lawyers how proportionality worked. Richard Goldstone laid down the steps that have to be followed, A B C D E, and so on. It was often quoted, and then, somehow people found it was too formulaic; they got into it; they got used to proportionality. So Harksen didn't become an important case. But I was shocked at the assumption that the wife's possessions automatically vested, unless she could prove [otherwise]. And I'm thinking, come on, if Kate's husband, who's actually a very good lawyer, goes insolvent, how can you say that her assets, which she's purchased with her salary as a Judge, automatically go? Or Yvonne, automatically - her husband is a professor of political science.

CHAPTER: THE 'SPOUSE' AS 'WIFE' IN PRACTICE

And although the neutral word 'spouse' was used, in practice, everybody spoke about him and her. The spouse was the wife, in conversation. The law spoke about the spouse, but everybody knew it meant the woman.

And I found a judgment by Bertha Wilson, in Canada, pointing to the fact that discrimination often is created by multiple semi-invisible threads that women know and understand and feel. They're not out there; they're not obvious; but cumulatively, they become a kind of trap that would weigh women down and prevent her from enjoying the things that the husband could enjoy and simply take for granted. So, I use that formulation in that case.

CHAPTER: WHY SHOULD JILL COME TUMBLING AFTER?

THANDI MATTHEWS

Sorry Judge, a nice quote, I think you said, if Jack falls down [and breaks] his crown, why should Jill also go down?

JUSTICE ALBIE SACHS

Why should Jill come tumbling after? And I remember my colleagues were very amused, but they didn't agree with me. I think I might have gotten some support from Kate, but it was very much a minority judgment. I was disappointed by the Court in that respect. It wasn't the main focus; the argument wasn't primarily about that.

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