



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

THE JORDAN CASE – VIDEO TRANSCRIPT

CHAPTER: IS CRIMINALISING THE OFFERING OF SEX FOR REWARD AN INVASION OF THE RIGHT TO PRIVACY?

JUSTICE ALBIE SACHS

The Jordan Case. We got twisted up in the Court about that case. Nothing was straightforward. Ms Jordan ran a brothel. Apparently, it was a clean, healthy brothel, well managed. The women were volunteers, and she objected to the fact that the police were always closing in on her. She said, *'It's my freedom. This is my choice, the women working here, they do the work, they get paid for the work that they do. They're looked after in terms of health, they get a decent income, they can send their kids to school. It's their business, it's got nothing to do with the state.'*

She takes the case to court. It goes to the High Court. The law says anybody who offers sex for reward is guilty of a criminal offence. And anybody who organises giving sex for reward, gets a criminal offence. She said, *'It's a violation of my privacy.'* The High Court judge agrees. He says, *'It's too wide... reward... you give a box of chocolates to somebody you take out to the opera, and she sleeps with you afterwards, that can't be a criminal offence.'* He strikes it down. It comes to the Constitutional Court. I remember David Unterhalter, a young advocate then, is arguing very strongly on the privacy basis. I find I'm very torn - how to approach this case?

CHAPTER: TWO STRONG, CONFLICTING ARGUMENTS

We had very strong amicus arguments from two different sources: A women's rights group in San Francisco – they followed cases all around the world, and sent in affidavits showing how women were being oppressed through prostitution and various forms of compulsion, even the compulsion of poverty. It was degrading to them [the prostitutes], it was harmful to them, to their health, their personalities, to their dignity; and [that] prostitution should be criminalised.

The SWEAT - Sex Workers [Education and] Advocacy [Taskforce] - is now sending in a counter-feminist argument, saying these are women, for various reasons choosing to provide sexual favour for money, that's their work, and having their work criminalised is profoundly dangerous to their health, because they can't get protection against HIV, which they might want to get otherwise. It leads to abuse by the police, to extortion and it's very demeaning to them.

So, here are these two conflicting arguments. I'm friendly with Catharine MacKinnon, the great feminist writer, and support most of her positions. I even sat in her chair at Chicago University and spoke to her on the phone on one occasion when she was working elsewhere in the country. Brilliant writer. She actually told me afterwards [that] I influenced her when she was studying at Yale University - still a young student there - and I gave a talk on apartheid in South Africa, and she asked me the question, '*Can you do anything for law working within the legal profession, or should you get out completely?*' I said, '*You can go in and fight within the Legal Profession Academy.*' I'd forgotten that actually. She'd liked very much a phrase I had used in a paper I wrote on judges and gender, that opened in my exile years... '*The one truly non-racial institution in South Africa is patriarchy, affecting all communities in equal measure*', and she liked that. So, we're very close, and she felt very strongly against prostitution as being demeaning to women.

I'm feeling, I don't know, it's one of those issues that I can't come down cleanly and forcefully and with total positive emotion one way or the other. I've never been with a prostitute; I've never thought of hiring sex. It's just not me. It's not the way I envisage interpersonal intimate relationships. But from literature, things you know, stories, everything else... I don't know... human beings are very, very varied.

CHAPTER: GENDER, PRIVACY AND RE-INFORCED STEREOTYPES

In any event, I don't think I'm asked to write the main judgment, I think Sandile Ngcobo wrote the main judgment. His position was that gender doesn't come into it directly at all. [It includes] any person who offers sex for reward; it's gender neutral, and that's the end of the matter. It's an issue for parliament to decide. So, I'm thinking of challenging that because when people are talking and discussing it's always, she, she, she, the prostitute; he, he, he, the client. It's assumed as that. It's not in the law, but it's in the practice; it's in the impact; and it's in the implications, how people understand the law.

So, I feel [that] privacy-- I'm doubtful about the privacy angle, in the sense that the women are publicly offering to surrender their privacy to whoever comes forward with the money. So, it's hard for me to see them claiming a fundamental right, under privacy, to say it can't be criminalised...

having a brothel, offering sex for reward. But the part that offends me is the assumption that it's the woman who's the criminal and not the man. That the woman is the temptress; the woman is the source of that evil, and these poor guys give in to their frailty. I felt that was profoundly discriminatory. It was all implicit in the context, in the reality as lived, but [also] in the stereotypes that are being reinforced.

CHAPTER: THE DECRIMINALISATION OF SEX WORK IN OPEN DEMOCRATIC SOCIETIES

So, I indicate I want to write a judgment to that effect. I asked Kate O'Regan if she'd like to join me in writing the judgment and she does. Kate's a great ally to have, she's very focused and gets the language right and connects with the Constitution very well.

Now, I had thought, actually, when I first started to write that most what we call 'modern democracies' had decriminalised sex work. If that's so, then I could strike down the law on the basis of open democratic societies say it's a matter of choice. But I discovered to my surprise I think there were only one or two countries in the world that actually decriminalised sex. Holland was one at that stage...

THANDI MATTHEWS

... full decriminalisation...

JUSTICE ALBIE SACHS

... then, it's changed since then - this is like 20 years ago. We're required to interpret the Bill of Rights in keeping with the values of an open democratic society. That's in the Constitution. To my disappointment and surprise, open democratic societies did not permit brothels. Now I'm not a supporter of brothels but I don't feel criminalising them serves any useful public purpose. It only strengthens the role of the pimps. It actually could foster trafficking. It leads to a number of knock-on negative consequences. So my view would be in favour of decriminalisation. But when it came to the privacy aspect, I felt because the sex worker is inviting the public to come forward and pay, she's surrendering her right to privacy, and open democratic societies accept that and they ban brothels and often ban soliciting.

So, now I'm bound by the Constitution that says it's not '*What does Albie think is the better approach?*' but how do open democratic societies deal with the matter of sex work?

CHAPTER: IT'S FOR PARLIAMENT TO DECIDE

So we deny the application based on the right to privacy. And that's been challenged, and maybe it will be successfully challenged one of these days. But I said '... there's another dimension to this

case.' Even in dealing with the privacy aspect. I said, '*... it's not what we Judges personally think might be the most sensible way of approaching the matter. That's a matter for parliament. It doesn't engage a fundamental right in so profound a way that we Judges would overturn what parliament has decided. Parliament can decide on decriminalisation.*' I wanted to put it on the map and introduce it as a very legitimate approach. So at least I was indicating my personal views indirectly by saying that's a choice that parliament had and it's open to parliament to decide whether or not to adopt that choice.

So, parliament has actually proposed a bill that would decriminalise. Catherine MacKinnon came to Cape Town to speak to me. She completely supports my idea that it's the man who should be held criminally responsible, that it's unfair to prosecute the sex worker, the prostitute, and not the man. Fairness is established by prosecuting the man only or both of them. She was very disappointed when, first of all, I said don't put my name to petitions but secondly, I don't want to become engaged in this issue, you know, I've said what I've had to say when I was a Judge. I think as we are talking now, the issue is before parliament.

CHAPTER: RESOLVING THE TWO POSITIONALITIES OF FEMINISM

THANDI MATTHEWS

[Remove coughing] Sorry to interrupt you Judge, but yes, the matter is before parliament again. What I'm interested in is how it gets resolved, these two positionalities of feminism. I've been in contexts where I have been very loudly criticised for allowing those two positions to be in one room, and to debate between people who are in this space for them to come up with their own deliberations on how to take the matter forward. If there is no resolution at a legislative level and the mores of society are in contestation with each other, does it get referred back to the Court to decide what that ought to be? Partial decriminalisation is still seen as problematic because even if the police target men and criminalise them, the women offering the work are also still going to be subject some form of attention from these patriarchal institutions that aren't necessarily going to be empathetic to their cause of work. So, it's still a very open question and we'll see how it gets resolved going forward.

CHAPTER: SAYING ONE THING, AND DOING ANOTHER

JUSTICE ALBIE SACHS

You know, I was very amused when I visited London. I'd make a point of going to Sir Sydney Kentridge, the great South African lawyer who had sat on our Court; and Felicia, before she became ill, would fry me some eggs for breakfast – that was the time I knew he'd be there. And he would tell

me stories about his life now practicing at the bar in London, where he became one of the top two or three advocates in a highly competitive area with maybe the greatest lawyers in the world. He was very proud of the house that he lived in, in the Maida Vale area. He said that house had been a brothel in the 19th century. And the parliamentarians, after they had passed laws denouncing prostitution, would take their carriages and enjoy themselves with the prostitutes in that house. He would say it with not a huge grin on his face, you know, in his laconic, amused sort of way. I can't help thinking, you know, how many members of parliament dealing with issues like this could have a personal stake in what's going on but might be saying completely different things and voting in a completely different way.

I get the feeling that the movement is towards general decriminalisation and the only way maybe they can reconcile is discouragement and alternative forms of support and work for women and at least ensuring that if brothels - or whatever term you use - are used; that it's not the women out on the street who can be punished so much; that the conditions are regulated, health is looked after and HIV and other STDS are not transmitted; and that the voices of the women concerned are heard all the time. But it's a very vicious fight. It's a very intense one. And I can only sympathise with you for being given hell by probably both sides for allowing the other side, the other voice to be heard.

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