



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

THE MAKWANYANE CASE – PART 2 – VIDEO TRANSCRIPT

CHAPTER: THE DICTATE OF PUBLIC OPINION VS A FUNDAMENTAL RIGHT THAT PEOPLE HAVE AS HUMAN BEINGS

JUSTICE ALBIE SACHS

I was full of admiration for Arthur Chaskalson's decision. Makwanyane has travelled around the world, people had difficulty pronouncing it, when the question of the constitutionality of the death penalty crops up. It's an extraordinary judgment, the clarity of dealing with all the issues that were argued one by one.

The main argument for the state was that public opinion wants the death penalty. They feel more secure. It serves as a deterrent. And he responds that we are not insensitive to public opinion; that we take account of it. But our decisions can't be dictated by public opinion. And the whole idea of a fundamental right is that it's a fundamental right that people have as human beings, even if you are marginalized, unpopular, distant, or remote. That's the very nature of a fundamental right. It's easy to have a fundamental right that everybody agrees with. It's only when it's tested that you have to uphold the fundamental right, even against the stream of public opinion.

CHAPTER: THE THREE PURPOSES OF PUNISHMENT – PREVENTION, REHABILITATION, DETERRENCE

So, it's an outstanding judgment. And the main line of reasoning was that there are [three] agreed purposes of punishment. One is prevention. The other is rehabilitation. And the third is deterrence.

In the case of prevention, you can achieve prevention by locking up. You don't need to execute. In the case of rehabilitation, by definition, you're not rehabilitating, you're killing the person. In the case of deterrence, the studies that were advanced to us indicated that, in the United States, each state has its own position on capital punishment. States that had capital punishment had a higher rate of murder than states that didn't have. There was no proof that it worked as a [special] deterrent. And the indications were that the threat of long-term imprisonment was equally strong as

the threat of being executed in terms of deterring the crime. Given the irreversible character, if a mistake is made, and the drastic outcomes, applying what Arthur called proportionality analysis, then capital punishment couldn't be sustained against the prohibition of cruel, inhuman, degrading punishments, and therefore he would strike it down. Now, I agreed with that, but that wasn't my reason.

CHAPTER: GOING FURTHER – THE RIGHT TO LIFE, THE RIGHT TO DIGNITY

THANDI MATTHEWS

You went a bit further.

JUSTICE SACHS

Much further. And most of my colleagues, we felt it's the right to life; it's the right to dignity. Even if it was a deterrent. They used to have in the Cape in the early period of Dutch rule, they would crucify the slaves who [rose] against the masters. The birds would peck the bodies while they were still alive to deter the people. It didn't deter.

I think some of my colleagues were worried about the right to life becoming linked with the question of abortion. And if you upheld the right to life, it could be used afterwards to prevent terminations of pregnancy. We didn't want to get into that area, but I know, certainly for Kate O'Regan, from what she said, and for myself, that was the crucial thing, the right to life.

CHAPTER: THE NOTION OF UBUNTU UNDERGIRDING THE BILL OF RIGHTS

And interestingly, Yvonne Mokgoro introduced the notion of Ubuntu, and she said Ubuntu's so powerful in African culture and the culture of the majority of the people. The interdependence of all human beings, the respect for the humanity even of the worst amongst us, that in a sense, when somebody misbehaves in that terrible way, it's not simply that person violating dignity and conscience, the whole society has failed. We all have to bear some, because we are so interconnected, some responsibility for managing it and handling it. And six of us signed on to the theme of Ubuntu.

And I think that is a very powerful undergirding of our whole Bill of Rights, the idea of I'm a person because you're a person; your personhood and personality doesn't diminish and undermine mine. On the contrary, the interaction, exchange between the two of our personhoods, is strengthening for both of us and for the society in which we live.

CHAPTER: ALL 11 JUDGES WROTE, COVERING MULTIPLE THEMES AND WIDE RANGING ISSUES

I mention this to show you how wide ranging the issues were, and in the end, each one of us wrote. It's the only case where all 11 Judges wrote.

And I might then take advantage to mention the themes that I recollect. I haven't read it recently, but as I remember, the one theme was the technical proportionality one; that you are not limiting the right, you're extinguishing the right. The other was the refusal to get drawn into American jurisprudence issues. Partly, the majority of judges in America upheld the due process of law authorising capital punishment, and saying Judges keep out, leave it to the states to decide.

But I felt we're not subordinate to American thinking and jurisprudence. We all have our own history. And the history in South Africa, from the time when capital punishment was introduced by the Dutch East India Company and then reduced in its severity, but continued in practice under British colonialism, taken over under the Union of South Africa, and then intensified under apartheid, where the rate of judicial executions went up steeply, there'd been a progressive diminution of the barbarity. And now the time had come to continue that process and get rid of it altogether.

CHAPTER: INCLINATIONS AGAINST CAPITAL PUNISHMENT AMONGST AFRICAN LEADERS

And a third factor was something I'd noticed in research on my PhD on The Role of the Judiciary in a Racially Stratified Society at Sussex University, amongst African people, a strong inclination from leaders against capital punishment. Professor ZK Matthews wrote against capital punishment. Tiya Soga, one of the first prominent African intellectuals in the 19th century, wrote against capital punishment. And at least three great traditional leaders were strongly opposed: Hintsa in the Eastern Cape, Xhosa speaking people; Moshoeshoe, the brilliant strategist, soldier, diplomat, and leader of the Sotho people - he wriggled to get out of imposing capital punishment, even when customary law said – some kind of offence, I think against the wife of the monarch had to be executed. He found a way around it. And Montshiwa from, I think, the Barolong. Setswana people are strongly against capital punishment.

I said contemporary human rights law puts a strong emphasis on minority views being considered. In South Africa it's the majority view that's never being considered, and there are strong pointers in the culture and the history of the majority population against capital punishment.

CHAPTER: A SENSE OF HUMANITY – BRINGING OUT SOMETHING BETTER IN PEOPLE

And I wanted to underline that that had been my experience as an advocate dealing with people from the townships, a sense of humanity, a sense of law serving some purpose to heal, to strengthen, to ennoble, to bring out something better in people. And the law's associated with

goodness, not just with terror, not just with retaliation and vengeance and violence. So I think these things featured in my decision.

It's not simply, is it a deterrent? You can have deterrents that do work. I'm sad to say, torture works, people say torture provides unreliable evidence. It does, but it provides reliable evidence as well. But you don't have torture because we don't use those methods to get information. You don't brutalise yourself in dealing with brutes. You've got to all the time manifest that distinction between your values, your beliefs, your style, and ways of doing things coherently, consistently, even when the pressures are there to forget them and just give way to brutality. That's what motivated me.

I discovered all my colleagues wanted to write. Finally, then, Arthur's got his judgment out and one by one, our judgments come out.

We would dictate to our secretaries. They would type it up, it would go on to a wax sheet and be Cyclostyled and we'd get these quite heavy batches of paper. It meant it was a deterrent to corrections. A lot of tippex would be used for correcting. The piles would grow bigger and bigger and bigger.

Finally, we are ready to announce the case, so we give notice. I think it was 48 hours always, the press could be there. The Court is jam packed and journalists from all over the world... Amnesty International very excited, a representative there. Arthur Chaskalson reads out the decision of the Court and he says... separate judgments were written by all the others. We file out. And we've delivered our first judgment.

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