the Albie collection

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

THE MHLUNGU CASE – VIDEO TRANSCRIPT

CHAPTER: ESTABLISHING KEY OBJECTIVES IN THE CONSTITUTIONAL COURT

JUSTICE ALBIE SACHS

So, within a few months, we had on the Constitutional Court then established a number of key things. Number one, our objective was not to become popular. Our objective is to work well and become respected and that was in the Capital Punishment Case. We gave our reasons. It was a thoughtful, well-crafted, and rich in many different ways judgment. And saying that we are here to do our duty to uphold fundamental rights without fear or favour. And if you want a new parliament, you can vote for a new parliament. If you're unhappy with our decisions, it's too bad. Maybe a future Court can change them, or you can amend the Constitution, but that's it. So, that came with the Makwanyane Case.

CHAPTER: SHIFTING THE TECHNOLOGY OF JUDICIAL FUNCTIONING

The Mhlungu Case, that's virtually unknown, we shifted the whole technology of judicial functioning away from classificatory, literal interpretation of words approach, to a purposive approach. And a purposive approach looking at why we have the Constitution, what the preamble says, what the foundational values are, what the Bill of Rights says, what the Constitution as a whole means, and signifies and how the different parts interrelate in the context of a world of people struggling for greater freedoms and greater social justice.

CHAPTER: PROPORTIONALITY – A TOTAL NEW WORD

That was a huge change in the methodology of reasoning. It involved proportionality - that was a totally new word. We'd used proportionality only in self-defence. We had to use reasonable defence proportionate to the threat that could exclude you from liability, for using violence. Very limited, but that same concept was now extended. It had come from German Constitutional Court reasoning, which they had developed in their administrative law courts. I remember when the English judges in England got a human rights act and they hated this word proportionality. It just didn't fit in with the logic of British judges over the centuries.

CHAPTER: ‘YOU DON’T USE A SLEDGEHAMMER TO CRACK A NUT’

And the one judge said that it’s not really difficult. He says, *‘You don’t use a sledgehammer to crack a nut.’* That was the laconic English Anglo way, you know, dealing with… It’s a little more complicated, a hell of a lot more complicated than that. But that conveyed their very matter of fact way of responding. In the US you can’t use proportionality. Forget about it. The most progressive, forward-looking universities I’ve taught at: Yale, I’ve been involved in discussions there, at Columbia.

THANDI MATTHEWS

Why not?

CHAPTER: DOES PROPORTIONALITY RATION RIGHTS?

JUSTICE ALBIE SACHS

They say proportionality means you are rationing rights. You don’t ration rights. You either apply them or you don’t apply them. And you can’t have proportionality to torture. You don’t have proportionality for freedom of speech, it’s either protected speech or not protected speech. And they are actually falling behind. The Canadian judges developed proportionality with their Bill of Rights from ‘82 onwards… provided very, very rich North American jurisprudence; progressive looking and valuable, especially in equality law, law relating to gender, sexual orientation, areas like that… wonderful decisions coming from the Canadian courts. The American courts are just lagging behind not only because of the extent to which it seems the courts are being packed by people selected for predetermined views on the culture wars; but also in terms of methodology. The proportionality is at the heart of constitutional jurisprudence in Japan, in Germany, in South Africa, in Kenya, in Canada, in Colombia, in Argentina, but not in the United States of America.

CHAPTER: (DIS)PROPORTIONALITY WITH REGARDS TO CAPITAL PUNISHMENT

So that came in with capital punishment. It wasn't disputed at the time, but Arthur used proportionality analysis to say that the use of capital punishment was disproportional. It couldn't be justified because of its severity and irreversibility. As I said, we, and many others, didn't accept that limitation of his reasoning. We felt it was too narrow; we would have gone further. But it was an important case because we dealt richly with jurisprudential technique. We gave our reasons. We all spoke in our different voices. That was Makwanyane.

CHAPTER: SHIFTING TO A COMPLETELY NEW WAY BASED ON PURPOSIVE REASONING

Mhlungu, then, for the importance of shifting away from the traditional way of people trained in the English common law tradition of judicial reasoning and judicial power and judicial review to a completely new way based on purposive reasoning, and accepting that you can put pressure on the words - put pressure on the words; to accomplish, achieve, arrive at a constitutionally compatible

version of the language used by parliament. [This] is better than striking it down, sending it back, having it changed because it didn't fit. So that had enormous implications for our reasoning.

THANDI MATTHEWS

It's interesting because I think with respect to you talking about the evolution of the methodology, but it also speaks to how you can adjust to a changing world.

END