



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

## THE NATIONAL COALITION OF GAY AND LESBIAN ORGANISATIONS CASE – VIDEO TRANSCRIPT

### CHAPTER: PROGRESSIVE JURISPRUDENCE SO EARLY IN OUR DEMOCRACY

THANDI MATTHEWS

As a younger South African, something that makes me very proud is how progressive our jurisprudence has been with respect to same-sex relationships. We live on a continent that has been very anti, or very regressive, with respect to the subject, largely because of the laws that have been imposed on us from the British colonisers.

I wanted to find out from you what the thinking was and the activism involved in having such progressive jurisprudence so early on in our democracy in one of our earliest cases, decriminalising same-sex relationships in 1998 already.

### CHAPTER: THE FIRST COUNTRY IN THE WORLD TO CONSTITUTIONALISE A PROHIBITION OF DISCRIMINATION ON THE GROUNDS OF SEXUAL ORIENTATION

JUSTICE ALBIE SACHS

Just a tiny correction there, it was the British and the Dutch. The Roman Dutch law, very Calvinist, stern prohibition, punishment for sodomy. We actually had to deal with the common law that had come from Holland rather than a colonial statute that had been imposed by the British

I think the Judges of the Court are very happy to accept praise for having taken a progressive outlook. But one has to go a step back because it was the Constitution writers, even in the Interim Constitution in the Bill of Rights, [it] included sexual orientation as a forbidden ground for discrimination. 1993... I'm fairly sure it was in the interim Constitution... but certainly 1996, the final Constitution. That's like 30 years ago. South Africa, the first country in the world to constitutionalise a prohibition on discrimination on grounds of sexual orientation.

### CHAPTER: EXCITEMENT IN THE COURT - THE SODOMY CASE

The National Coalition of Gay and Lesbian Equality brings the case... excitement in the Court now it's out in the open. And just the word sodomy, sodomite, Bible, castigation, Sodom and Gomorrah—there's all these kinds of images attached to the very idea. But it was called the sodomy case. It was shorter than saying the National Coalition etc., etc., etc. And very carefully prepared arguments. The common law – the Dutch common law - which made murder a crime, theft a crime, robbery a crime, became part of South African law so when the British took over the Cape, they agreed to keep Roman Dutch law rather than impose the British common law. So all of these were taken over and became part of South African law, but Roman Dutch origins. And similar kinds of motivation, very strongly church-directed repression. And in a number of different statutes, it's a crime in itself, it's aggravated penalties and, there were I think about six different statutes that referred to sodomy - they were all challenged. It was quite clear, the Constitution says no one shall be subjected to discrimination on the grounds of sexual orientation.

#### CHAPTER: WHAT RIGHTS WERE BEING CHALLENGED?

##### JUSTICE ALBIE SACHS

But what rights specifically were being challenged? Was it a right to privacy? Was it a right to dignity? Was it a right to equality? And the lawyers for the main applicants were very strong: *'We want it to be equality not privacy.'* And the underlying motif was that privacy means the state won't interfere, you can do your dirty little thing, and we won't interfere. It wasn't ennobling. It wasn't emancipatory. It was just like tolerating something. Dignity seemed a bit too remote. They wanted it to be equality. *'We want to be treated as equals to heterosexual people, to live our life as equals to heterosexual people.'*

We had all sorts of arguments along the way. Hardly anybody defending the law, given the text of the Constitution. And one of the arguments very strongly pressed was: It's not anal penetration that's the offence because if a man penetrates the anus of a woman, not guilty. If it's another man, guilty. That was the form of discrimination that was shown. That was, if you like, the old school type of reasoning, old school type of logic. And I felt, no, lesbian women are in a sense as much oppressed by sodomy laws as gay men. There's something on the go here that's attacking and penalising homosexuality and we've got to reach that.

In any event, Laurie Ackermann is asked to write the lead judgment. It's a magnificent judgment. It's not just technical, it's strong, profound, thoughtfully reasoned, well set out, always beautifully articulated and clear. And I was very happy to sign onto that.

#### CHAPTER: THE STRONGEST OPENING STATEMENT

But I felt there was something missing. There was something more that needed to be said and I wrote a concurring judgment and I remember I opened my judgment with the statement, '*Only in the most technical sense is this case about who may penetrate whom where.*' [Justice] Stephen Sedley of the superior courts in England said it's maybe the strongest opening statement of any judgment he's ever read, I should get a prize for that.

#### CHAPTER: THE RIGHT TO BE DIFFERENT

But I deliberately chose that thematic, that point of reference, saying, '*This is not what the case is about. The case is about the challenge to deviance, to be different.*' And I wanted to deal with the right to be different, not simply the right not to be penalised for expressing same-sex desire, the right to be different. That had a much broader meaning than simply allowing gay and lesbian people to live freely in South Africa.

I'd actually been influenced by a conference I attended. It was called the Aspen Institute, a seminar up in the Colorado mountains. It was chaired by Harry Blackman, a Supreme Court Justice famous for writing the *Roe versus Wade*. I'm even getting the name wrong now that it's been overturned. He gave the last presentation, we had like nine days, and you had to be there 8.30 in the morning, not a second late until 1 o'clock and then you're free for the rest of the day. About 25 of us sitting around the table, half men, half women, completely open debate, nothing being recorded, nothing going anywhere, just a beautiful opportunity to express ideas. And one day is set aside for gender rights. A lot of women are speaking and somebody puts up a hand and she says, '*I want the right to do everything that men do.*' Then the next speaker says, '*I don't want to be like men and do what they do, look how they've messed up the world. I want the right to be different.*' I'm agreeing with her, and I agreed with the first one. I think, how can I agree with the first one and the second one?

#### CHAPTER: THE RIGHT TO BE THE SAME AND THE RIGHT TO BE DIFFERENT

And I came up with this idea—you're fighting for the right to be the same, and the right to be different. The same person is fighting for both. The same in terms of access to education, and health, and voting in the public. And different in terms of living as a human being, maybe nursing, bearing a child, whatever your biology requires but also whatever your sociology indicates for you. And you're fighting for both but in different spheres. That was quite an important discovery-- the right to be different. For me it was part and parcel of the claims of same-sex partners. So, I want to bring that

into the equality debate, that equality is not simply fighting for the right to be the same and to do the things that the exalted, the privileged, the dominant class do. It's the right not to be part of the mainstream. It's the right to be who you are, to express yourself as you are. And this was, for me, particularly important for what I call the gay and lesbian community, not just for the individuals making choices in life, but for the community, a section of society. And it made it necessary to redefine what you mean by equality and to emphasise that equality is when you treat everybody with the same concern and respect across difference. You come in as you are, and you're treated with equal concern, not 'you're okay if you assimilate into the mainstream'. For me this was a profound point of special importance in South Africa, where there was hegemony in so many different areas of belief, religion, race, a whole range of different things-- the right to be different. It means equality across difference, not through suppressing difference. For me that was one big theme that didn't fit neatly into Laurie's presentation. And I explored all those themes.

#### CHAPTER: IT'S THE PERSON, NOT THE ACT, THAT'S BEING PUNISHED

The other was the theme I picked up from reading - it wasn't even reading Foucault - it was reading somebody speaking about Foucault. The point that he'd made that the person being punished, it's not the sodomy that's being punished, it's the sodomite. It's the person who has a lifestyle and choices and forms of expression that are regarded as abominable. It's not the act. And I'm thinking this is part of the equality that's involved here. I also read something by DuBois about the Negro in America who belongs and doesn't belong, part of the society and not part of the society. For me, this was foundational to the punishment of sodomy, the 'invisibilising' of people, the tainting of desire, the way a whole community was now being attacked as somehow threatening, undermining, perverse, ugly, and vicious, and I wanted to bring out these themes.

Some things I'd picked up traveling in the States where there was a huge amount of literature on the question of gay rights that started coming out after Stonewall and afterwards. And sometimes some wonderful quotes, sharp writing. I still remember the one writer speaking about '*the love that dared not speak its name*' from the famous poem by Oscar Wilde. He said, '*the love that dared not speak its name, ten years later wouldn't shut up.*' Everybody was writing about it. A community claiming rights as a community now, not just individuals claiming their rights. And the other was the nature of the exclusion and oppression. A young guy doesn't come home to his parents and say, '*Mum, dad, there's something I've got to tell you: I'm black.*' It's the invisible nature of the discrimination. It's the exclusion through a kind of marginalisation, the non-recognition of lived reality and experience. Sometimes, it's not even targeted. So, the same-sex marriages, there wasn't a part of the marriage law that said gay people can't marry. They just weren't included in the marriage vow.

So, the discrimination then is very specific to the group that's affected. And sometimes it's visible characteristics. Sometimes, in the case of gender, it's obvious and not obvious. And in the case of sexual orientation it's normally not visible, it's an invisible thing... and punishing people for being who they are. I wanted to explore all those different areas, and my methodology would be to go to libraries and just read and read and photocopy. I'd have huge piles of photocopies. It was before we had all this virtual stuff that you could simply put online, and I would star sentences that I liked, passages that were pungent, modes of expression, you know, that had a certain vitality and life. And some of them would come in as quotes into my judgments later on.

So, after reading Laurie's judgment, I just felt that there's so much that I really want to add. It was very exploratory, and it hadn't been fully argued. So, the Court couldn't take it on. In the end, my colleagues said, '*We agree in principle.*' So they didn't tie themselves down to actual doctrine.

As it turned out, years later when the Fourie Case comes, I'm able to take big chunks from my concurrence in the National Coalition Case, and now the whole Court is agreeing. And things evolved over time. Attitudes changed. People got used to same-sex relationships in a way that they hadn't before.

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