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

THE PRINSLOO CASE – VIDEO TRANSCRIPT

CHAPTER: CRAFTING THE UNIQUE EQUALITY CLAUSE IN OUR CONSTITUTION

THANDI MATTHEWS
Our Constitution is quite unique in the way that the equality clause was crafted. Not only does the Constitution protect us against discrimination as citizens but it also places a duty on the state to promote equality. I think your first judgment where we theorised the right to equality was the Prinsloo Case. Could you speak to us about it, and the thinking that underpinned the judgment?

JUSTICE ALBIE SACHS
Yes. The *Prinsloo versus Van der Linde Case*. It was all about fire-controlled zones, non-fire-controlled zones, and what happened if a fire spread from a farm in a fire-controlled zone and caused damages. Where the onus of proof was, and if it spread from a farm that was not in a fire-controlled zone and caused damage. It was a super technical case, and the challenge was to the law because it discriminated. So, it was said it treated unequally people who had a fire that started on their farm in a non-controlled fire zone; they had to prove that it wasn't their fault.

CHAPTER: IS THIS WHAT THE FRAMERS OF THE CONSTITUTION HAD IN MIND?

Now all that sounds like super technical stuff, and I am asked to provide the lead judgment on that for the Court. And I'm thinking, equality, apartheid South Africa, fighting for freedom, for dignity… Is this what the framers of the Constitution had in mind when they were speaking about equality? And it just didn't seem to register. But the argument was basically equality means treating like cases alike. So, I'm thinking now, *'What is the theoretical foundation of our equality law?'* All laws discriminate, they draw the line. You have tax levels, and the richer you are the higher percentage of your income goes to tax. Is that what equality law is about? Well, maybe it helps get equality, but you can't say, *'I'm not being treated alike, and everybody should have the same proportion.'* There are a whole range of different areas where the law draws a line, and you fall in or outside the line, and you're

treated differently. It's in the very nature of legislation to differentiate and impose duties in particular cases.

So, I felt that if equality law is now going to be now drawn into every aspect of law where there are classifications that impose different burdens and responsibilities to different people, firstly, the courts will be clogged up forever. Secondly, where the shoe pinches; where there's been real human hurt; where people have been denied their personality, their dignity, their sense of worth; it will get lost in disputes between farmers who live in fire-controlled zones and non-fire-controlled zones.

CHAPTER: EQUALITY LAW IN THREE COUNTRIES

But we need some theoretical foundation for saying what the focus is. So, I said to myself, I'm going to look at equality law in three countries. United States of America was one because after the civil war, the theme of equal protection is introduced into their Constitution - I think it was 1860s - and a fair amount of legal theorising emerged in the United States on equal protection.
What was noticeable is that the law throughout the world had centuries of debates and discussions about liberty, and that became the cornerstone of constitutionalism in the late 18th century in France and United States. France destroying the monarchy and United States destroying colonialism. But equality wasn't there in the US at that stage.
CHAPTER: PICKING PIECES FROM THE UNITED STATES CONSTITUTION
I remember, in the years when we were talking about having a constitution, we had a group of very critical academics from the United States. Amongst them was a certain Kimberly Crenshaw who came to Cape Town - University of the Western Cape. And I remember one of them saying *'don't look to the American Constitution. It starts off ''we the people", but it could've been "we the white people, we the white male people, we the white male slave owning people, we the white slave owning people who've dispossessed the indigenous people and taken land away from the Mexicans." Our Constitution is built on injustice. Tear it up and throw it away.'*

I remember my response was, *'… okay, that's a salutary lesson but we'll pick up the pieces and put them together again, because there's so much in the Constitution that is valuable, that can be developed, that established separation of powers, that established a concept of fundamental rights, and we build on that.'* So, in that sense the US pioneered the testing power of the Supreme Court, it pioneered equal protection law as entrenched law, but when I looked at the jurisprudence it was so technical.

For years there was separate but equal protection, segregation, manifest inferiority based on pseudo responsiveness to equal protection but through segregation, which was always inferior in practice, but inferior in the sense that excluded a marginalised section of the population. Out of that, a doctrine emerged of suspect classifications and strong state interests, and it was very technical. At the time now, we're speaking about 1990s, the conservative thinking on the Supreme Court was becoming predominant, and affirmative action was being struck down as an example of racism. I felt that we don't want to get sucked into the majority and minority positions shifting in the United States Supreme Court, with forms of reasoning that were very artificial, and very unrelated to the social reality. So, I felt that we were not going to get much help from them. The US judicial thinking predominantly now became almost equated to using the principles of civil law and criminal law in the case of groups that are being targeted on the grounds of race or religion, or whatever it might be - they can get a remedy.

CHAPTER: NEGATIVE AND POSITIVE LESSONS

So much of racial oppression, and gender oppression and other forms of oppression wasn't based on pointing to a group and saying, *'thou shalt not do this or that.'* It was the way the law operated in practice, the impact that it had, playing into stereotypes, systematised forms of social relationships, reinforcing those relationships. So, I felt, we're not going to get a hell of a lot out of it. Maybe more negative lessons than positive lessons.

Brown versus the Board of Education - it is one of world's great legal decisions. It was an amazing breakthrough by the judges, reversing almost a century of separate but equal doctrine on the basis that anybody could see for themselves…. it meant treating a group as though somehow, they contaminated the mainstream of society, they had to be put apart. It was inherently invidious and ugly and differentiated in a way that deprived people of their sense of moral worth and moral citizenship in the society. Unanimously, they found a way of just striking down separate but equal. A very powerful decision and a marvellous example of a creative court that is sensitive to changing values about human beings, and the worth of human beings, the rights of human beings and what a court can do. It's not only assisting particular people in particular situations, but also establishing a kind of point of reference for the society. Great.

Many other cases in the 70s and 80s in US Supreme Court. Strong cases on gender. Ruth Bader-Ginsburg's beginning to have an impact as a litigator then, and other people like herself. But it was all

over the place and there was no sound conceptual theoretical basis for their reasoning. It's a kind of a crafted artificial mechanism produced by the Supreme Court that, in the end, is striking down measures designed to advance the lot of minorities in America who have been kept back by overt, blatant discrimination.

We were not getting a lot of help from the US, so then I looked at India. India had a very powerful Supreme Court in the 1970s and 1980s. The Chief Justice of India visited South Africa - PN Bhagwati. He sat on the Goldstone Commission. The Solicitor General in India, [Soli] Sorabjee, visited us, and I got such a thrill going to workshops of senior judges and professors and law teachers and others, and seeing these guys from India having them spellbound. Spellbound because there was great erudition, they handled legal concepts nimbly, and comfortably, and easily, but there was passion as well. A judicial passion. Not shouting and being emotional and tubthumping, but the sense of importance of justice.

CHAPTER: I COULDN'T SAY, 'CHIEF JUSTICE, DID YOU EVER GO TO JAIL?'

I remember when I sat down with Bhagwati one day, he's sitting close to me like you're sitting now, and I got an instinct that he'd been to jail. I couldn't say, *'Chief Justice, did you ever go to jail?'*, so I asked him a question. I said, *'When did you start your legal practice?'* And he said, *'In fact, I started two years later than my colleagues because I'd been in the Indian Congress Youth organisation and the British sent me to jail for two years.'* Something I intuited in him, that he wasn't simply one of these barristers that trained at the Inns of Court in London, who'd come back with an anti-colonial philosophy, but very formal, very tight in legal reasoning, very narrow, very focused. I just sensed there was something different about him. And he indicated afterwards that he was a strong supporter of Gandhi and Gandhian ideas.

None of it is directly in his judgments, but it was in the way they opened up the role of their Supreme Court. They took cases from prisoners who were barely literate. Before, these cases would've been rejected because you're not following proper procedures, the documents have to be typed in a certain format in quadruplicate and presented. These would be handwritten complaints that, *'our lives are horribly being abused.'* It was called the epistolatory jurisprudence. They allowed public interest litigation by organisations on behalf of the poor and the marginalised, who themselves weren't in a position to come to court to say, *'my rights are being infringed'*.

CHAPTER: INDIA - AN IMPORTANT PROTOTYPE FOR SOUTH AFRICA

What they were doing, in a sense, was redeeming the Constitution in India. This amazing Constitution that was an important prototype for us in South Africa, produced by the Constituent Assembly. Not at Lancaster House negotiated with the British, but on Indian soil by representative Indian people with a Dalit [untouchable] leader presiding over it, and an extraordinary Constitution that's held up. India has had huge problems over the decades, but the Constitution still functions, and functions well in terms of elections and the openness of the society. So, I thought this will be a good source for us. There was a lot of proactive judicial interventions to protect the rights of marginalised groups. But I couldn't find a solid theoretical foundation. It was responding to the equities of a particular case, and you felt a legal formulation of treating like alike sometimes; other formulae were used and appropriate; but there wasn't an underlying theme.

CHAPTER: CANADA – THE CONCEPT OF PROPORTIONALITY

Then I looked at Canada. We were very fortunate that in 1982, Canada adopted a Bill of Rights. So, it's one of the former common law British colonial countries inheriting the British common law system, the judges functioning the ordinary way, subordinate to parliament, and being able to intervene a little bit here and a little bit there, but everything is subject to parliament. Parliament is supreme, they've got to carry out everything that parliament says. And it's no accident, Pierre Trudeau was the Prime Minister then, he was from Quebec. And Quebec nationalism was growing, and one of his responses to Quebec nationalism was to say, *'We don't want an independent Quebec, but we want the sense of equal rights throughout Canada.'* So, you're Québécois, and you're from Manitoba, and from Ontario… we're all Canadians, and it includes rights to language, and culture and so on. And that goes some way to giving the Québécois a sense of personality and dignity and distinctiveness, without secession of the state. That was his motivation. And they came up with a very forward-looking modern type of Bill of Rights and appointed a supreme court that had a jurisdiction different from the supreme court before. Before, the supreme court had to deal with interpreting the laws of parliament. Sometimes, if there was a dispute between a provincial law and a national law, between the provinces… issues like that. Now, their supreme court has to deal with fundamental rights. They use the concept of proportionality very strongly, which they took over from the German Federal Constitutional Court. Proportionality being: You have a right, the rights can be limited, rights are not absolute, they can be limited, but the limitations have to be reasonable in an open democratic society.

So now it's a completely different methodology that's being used in terms of upholding or striking down the law. You couldn't strike down the law before. Parliament was sovereign. So now they are grappling with that issue. The court's got this great power. And I might mention, I met Brian Dickson, the chief justice. He was retired before I became a judge. I was hoping to become a judge, and I said, naively, like people ask me now, '*Do you have any advice to offer if I'm appointed to the court?*' He thought for a moment, and he said, *'You need a lot of judicial statecraft.'* I never forgot that. Don't just work hard, listen, keep your open mind… that's all banal stuff. You need a lot of judicial statecraft. And when it came to actually working with cases, I saw how important that was.
In any event, he was supported by Bertha Wilson. Bertha Wilson was Scottish born and married to a minister of religion in one of the kind of… not liberation theology, but a kind of critical religion. And they migrated to Canada, and she supported him for ten years in the ministry, and then he supported her for ten years, [she was] working as a lawyer. Not as a practicing lawyer - she was a librarian in a big law firm. Just brilliant. She just did her work in a way that just showed amazing sense. She was feminist, and she came from a kind of Labour Party, leftish, community-based background. Very different from the traditional lawyer going up through the ranks, associating with the wealthy, becoming like the wealthy. It was called the Dickson Wilson Court, and they developed a very progressive, forward-looking view of fundamental rights in a modern democratic state.

END OF EPISODE 1

THE PRINSLOO CASE PART 2

CHAPTER: SUBSTANTIVE EQUALITY – 'THIS HAS GOT A LOT TO OFFER US'

The theme of equality was central. And fairly early on they pushed for what they called substantive equality. They moved away from the formal equality of treating like alike. Treating like alike supports the status quo, you don't change. Substantive equality looks at the impact of the law and the measures on people, and if the impact is unfairly discriminatory, then even though that group is not targeted, the result is inequity and an abuse of equality. So, it was a whole different conceptual way of looking at equality. I was taken with that. I felt this has got a lot to offer us. Not because I like Canada and it's a socially progressive country, it's an open country; maybe less exciting than the US, but it's less bizarre than the US. I liked the conceptualisation, the reasoning. But still they were at each other's throats on the formal definition of equality.

So, I think it was 1998, I'm invited to Nova Scotia for a conference by the Canadian Judicial Institute, organised by them. And it's on equality. No no, it's not on equality… It's on fundamental rights in the 21st century. Can you imagine? 21st century seemed so far away, like some futuristic science fiction thing. And I thought, *'… great, I'll go to Canada.'* And I'm a young judge, and there's a lot of gravitas in Canada… maybe I can pick up some of the gravitas, mingling with all the judges there. I make my presentation, and I deal with what I call false dichotomies, but true contradictions. And with dichotomy, you come down one side or the other; with contradictions, you balance out in relation to a whole range of questions facing the judiciary. And one of them was insiders-outsiders, subjective-objective. And in both of them, feminist reasoning was very important, because feminist reasoning was to look at the inside and the outside, the political and the judicial, the personal and the political, the public and the personal… all these dichotomies now somehow are not something you suppress, and come down on the one side or the other, but that you recognise, embrace and deal with.

CHAPTER: THIS MAN FROM SOUTH AFRICA USING THE WORD 'FEMINIST'

The net result of that was that I've made my speech, I'm walking to tea, and I see two women advancing on me, laughing, talking away, one with a French Québécois accent. And they come to me, and they almost capture me. They were very thrilled I used the word 'feminist'. They can't believe it, this man from South Africa using the word feminist, with saying feminism is offering something, not just for women but for legal reasoning. It's dissolving the hard categories; it's introducing elements that are important for understanding how law works and functions.

There was no gravitas there. It was Rosie Abella and Claire L'Heureux-Dubé. Two brilliant women, very different in manner and style, but both sparky, and fun, and full of energy. So, I didn't get gravitas, but I got that. But I got more. There was a Professor Lynn Smith from the University of Vancouver, and she did a survey of Canadian jurisprudence on equality. And she said the Supreme Court is agreed on a whole range of things. It's agreed on that you look at equality from a substantive, impact point of view. It's not the intention of lawmaker that matters - to harm - it is the actual harmful discrimination in practice, on groups of people who because they belong to that group - not because of their personal qualities, or worth, or capacities - just because they belong to that group. They all agreed on that. But then there were all sorts of classificatory differences. And she said three judges go this way, two another way, another two and another three the other way. And there's one judge who stands out on her own, and that was Claire L'Heureux-Dubé. And she said, *'… at the end of the day, equality law is about human dignity, not about classifications.'* And if your dignity as a human being is being undermined and assailed simply because you happen to belong to

a particular category of people, that historically have been marginalised and subjected to systemic forms of exclusion and unfairness, that's the basis of it all.

CHAPTER: WE'VE GOT IT! THAT LIGHT BULB MOMENT. HUMAN DIGNITY.

We've got it, we've got it! In my head, that light bulb moment, this single judge in the Supreme Court from Quebec. And I felt that's the core of our jurisprudence and equality in South Africa. It's human dignity. It's the anti-apartheid principle, of apartheid denying people their dignity as human beings because of race, skin colour, background, and also because of religion, and also because of gender, and many other ways - but officially, openly on the grounds of notions of white superiority, white supremacy. That's why equality is the first in the Bill of Rights in South Africa, before freedom and even before human dignity, we start with equality – that's the post-apartheid Bill of Rights.
And that registered with me, and I felt that is the theoretical foundation of our equality jurisprudence. It's not to rectify all the inequalities in our society. There are so many. There's class injustice, for sure, and class injustice intensifies the human dignity aspects. But that's not the job of the courts, in the constitutional context, to bring about those changes and remedies. That's the job of parliament, of the people voting for the people they want to bring about the social transformations. It's those areas where there's a kind of ugliness, an inhumanity, and sharpness, and unfairness that crushes and bears down on people. This is why we need equality in South Africa, and this is where the courts have got to intervene. This has got to be the pedestal, the foundation, the basis on which we develop our equality jurisprudence.

So, now, this is all grand stuff for these poor farmers up in the Karoo somewhere, and the fire went from one farm to the other, and he didn't want to pay the damages, and he goes to the lawyer and the lawyer says, *'… the law is unfair because it's not treating you equally because you weren't in a fire-controlled zone etc.'* And so I said to myself, okay, human dignity is not involved in paying damages for a fire spreading from your farm to another farm. This is not what our equality jurisprudence deals with. This is not when the Constitution says everyone is entitled to equal protection of the law. It's meant to deal with the historical injustices, the systemic injustices, imposed upon people for being who they are. And it might be biologically, in appearance, who they are; and it might be in terms of gender; later on, in terms of sexual orientation; that's what our equality law is really based on.

So, I felt, no, this is big stuff. We're laying a foundation for reasoning for future judges, for decades. I'm just Albie. I'm going to ask Kate O'Regan, who had done a lot of work on feminist jurisprudence, to join, and Laurie Ackermann. Laurie was a superb crafter. You have an architect who has a vision, Laurie had quite strong vision, but his strength lay in the crafting and the vision being represented in terms of a legal technology that's convincing, that's recognisable, that's persuasive. And a marvellous person to have on your side. So, the judgment comes out in the name of the three of us.

CHAPTER: 'PROVIDED IT SERVES SOME RATIONAL PURPOSE'

I'd done some research in United States on the minimum that a law needed to be a law, where the courts don't intervene. It was important that the courts don't take over the job of being the supreme legislators for the country. It's not only the abstract separation of powers idea. We don't get the information, we don't have the training, we don't have the skills, we don't have the broadness of vision; we're focused in certain areas. So, it's partly a functional thing. It's not even only that we're not elected, we just can't do it and it's not our job. We wouldn't be particularly good at it. We might or might not, it's hit or miss. So, it's very important then that the courts function in the area given to them by the Constitution, upholding fundamental rights, ensuring that the other institutions of government function as the Constitution requires them to function, but not interposing its own values and being smarter than the legislators or the executive.

In the Unites States, the background was a horrendous one. The court, in the time of The New Deal, striking down measures by the Roosevelt government to alleviate the conditions of the unemployed, the rights of workers. So, the idea was to establish a very low threshold for a law to be a law. And all laws classify, all laws differentiate… that's the nature of law. I put in a phrase, *'provided it serves some rational purpose.'* That's all that's needed. It doesn't even have to be reasonable; it doesn't have to be the best; it doesn't have to be the most suitable; it doesn't have to be the cheapest. It just has to pass that tiny, lowest threshold possible - rational.

CHAPTER: RATIONALITY - UNINTENDED CONSEQUENCES

I didn't realise then that - completely, utterly, unintended - that phrase would become the basis of rationality jurisprudence a couple of decades later. That's an extraordinary example of unintended consequences. The idea was to show how low the threshold was, but even that tiny threshold became enough for the intervention later, and I can deal with that on another occasion.

I was influenced by an American professor, Cass Sunstein - from Chicago University; I taught there sometimes - very brilliant, and bright. His father had worked for Roosevelt. He had a strong feeling for the role of the law, and the courts, supporting the poor, the marginalised, the dispossessed, having a positive role in that respect and giving the legislature a wide margin to do things to make life better for disadvantaged people in the country. And he said, as long as the law doesn't represent – he called it a naked – preference, and served some rational purpose, it would be enough. So, that came into the Prinsloo judgment.

And then the Prinsloo judgment ended up by saying, quoting from Claire L'Heureux-Dubé from Canada, and putting human dignity and the impact on the dignity of groups that were systemically vulnerable, because they belong to those groups, at the core of our jurisprudence on equality. It's been challenged, and I'll come later to an example of where it was challenged, but it meant it wasn't difficult for the Court then, unanimously, to reject the claims of the farmer in the non-fire-controlled zone to say that he didn't have to pay up the damages for the fire spreading from his farm to neighbouring farm. He had to pay, and don't look for equal protection in our Constitution as something that's going to save you from paying.

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