



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

THE SANDF CASE – VIDEO TRANSCRIPT

CHAPTER: CAN SOLDIERS HAVE TRADE UNIONS?

THANDI MATTHEWS

Judge Albie, the next case that I'd like to engage with you on, I think is a very important one. It was called the SANDF Case. It had to do with whether it would be constitutional to prohibit members of the armed forces from participating in public protest and from joining trade unions. Judge O'Regan had said in that case that soldiers are entitled to be members of trade unions as per the right to freedom of expression and fair labour practice embedded in our Constitution. You concurred with Judge O'Regan, and you had said that you'd like to complement her eloquent articulation of the centrality of freedom of expression in our constitutional democracy, with the following consideration: A blindly obedient soldier represents a greater threat to the constitutional order and the peace of the realm than one who regards himself or herself as a citizen in uniform, sensitive to his or her responsibility and rights under the Constitution. The Constitution proclaims that national security is not simply directed towards the maintenance of power but must reflect the resolve of South Africans as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want, and to seek a better life.

CHAPTER: THE DEFENCE FORCE IN A CONSTITUTIONAL DEMOCRACY

It goes on to require that the security services must act, and must teach and require their members to act, in accordance with the Constitution and the law. It provides expressly that no member of any security service may obey a manifestly illegal order, and declares that the primary object of the defence force is to defend and protect the republic, its territorial integrity and its people in accordance with the Constitution. These provisions clearly contemplate conscientious soldiers of the Constitution who can be expected to fulfil their constitutional duties more effectively if the values of the Constitution extend in an appropriate manner to them, and infuse their lives in the armed forces. Can you please speak to us about that case?

CHAPTER: 'THE THINKING SOLDIER'

JUSTICE ALBIE SACHS

Yes, it was so interesting when this case cropped up fairly early on. It had been an issue in other countries. Can soldiers have trade unions? Our Constitution has very strong workers' rights, including the right to strike, collective bargaining, and form trade unions. And soldiers? Our tradition had been that soldiers are somehow apart from the law, they are there to fight wars, to defeat the enemy, and they have to be absolutely neutral. There's a lot of relevance to that theme of neutrality, that they shouldn't side with any political formations or parties, and feel answerable to any political formations or parties; that was very correct. But the vision of the soldier as this 'blind obedient, obeying commands, full stop', I found very anti-constitutional. And it was partly my experience in the struggle. Our soldiers on the side of the liberation movement-- in my case, I was never in uMkhonto weSizwe, the spear of the nation; I was never trained as a soldier; I never carried a gun; I never learnt to use a limpet mine; I never did the parades, and so on. But I had huge admiration for the people who were willing to give their lives for the freedom struggle. They put a huge emphasis on education, on understanding, on ideas, on theory, and emphasising all the time: You are not just somebody with a gun, you are a freedom fighter, and any force that you use has to be used to support freedom and nothing else. So, if anything, a higher morality, a deeper conscientiousness was required. Now, it wasn't always achieved in practice, of course, and there were some horrible violations of those standards. But that was the ethos. The ethos of this thinking, conscientious soldier was part of my background.

One of my colleagues, who had grown up in a military family, was startled when I spoke about the '*thinking soldier*', and he said, '*Soldiers don't think, they obey commands. You stop and think, and you can lose the war.*' But interestingly enough, in a later judgment, he used the phrase '*thinking soldiers*,' he was a thinking judge and willing to absorb a new idea.

CHAPTER: WHAT DOES THE CONSTITUTION ENVISAGE FOR ITS PRIME DEFENDERS?

Now I'm thinking of our new South African National Defence Force – SANDF – and what does the Constitution envisage? The Constitution envisages them as seeing themselves as prime defenders of the Constitution - not the state; not the power of the state; not the country in that abstract sense; but of our constitutional democracy. They can do that better if they do, and the Constitution expressly says, they must function in terms of the values of the Constitution. They must defend the country and the people in terms of the Constitution. Now if they must do all that in terms of the

Constitution, then surely they're entitled to reasonable enjoyment of the rights under the Constitution.

CHAPTER: DRAWING THE LINE - PERMISSIBLE LIMITATIONS

So, freedom of expression, you draw the line. You can't, in your military uniform, go and join a political protest. You can't, as a soldier, go on strike in the ordinary way because you want better wages. There are some things that, it's unreasonable, limitations are permissible. But what's not permissible is, when you are off duty, if you want to take part in public affairs, and you're not aligning yourself with particularly the political organisations, you can function. More specifically, if you are dissatisfied with the terms and conditions of your work, you should be entitled to have a say, to mobilise, to form a union. You can call it a trade union; the terminology doesn't matter. That was the essence of Kate O'Regan's judgment, and I was very happy to support it in the way that I did, and to use the language that I did.

Looking back now, I can say we have had huge problems and major setbacks in our country. But so far, the army hasn't gotten involved... so far. I can't say that maybe for all the security services, but so far, at least, the army has functioned within the framework of the Constitution. And I think it helps that there are thinking people inside the army, and not simply people obeying commands which they might or might not like.

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