



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

## THE SOOBRAMONEY CASE – VIDEO TRANSCRIPT

### CHAPTER: INTRODUCTION

#### THANDI MATTHEWS

On the one hand, South Africa has a progressive constitution, and we consider it to be progressive, because of the inclusion of socio-economic rights, to address structural inequality in society. Socio-economic rights were seen as a mechanism to redistribute wealth and income in our country post-apartheid, but also to create a new understanding of citizenship rights, very rooted in the right to equality.

At the same time, South Africa is the most unequal country in the world, and yet we have adopted a rights-based approach to our policy making. Our Constitution protects welfare rights, it protects the right to healthcare, including reproductive and health rights, food and water and social protection. Everyone has access to these rights, which makes us very progressive in that respect. We also have access to emergency healthcare and the first case that the Constitutional Court dealt with in respect to access to emergency healthcare, was the Soobramoney Case.

#### JUSTICE ALBIE SACHS

It was a...hell of a case. Mr Soobramoney suffered from renal failure. He needed dialysis. Dialysis is expensive. He collapsed. He went to the state hospital. They gave him emergency treatment. But they said afterwards, *'Sorry, Mr Soobramoney, we've only got 17 machines, here in Durban, they have to serve a big population, they're expensive to operate and we have to prioritise. And you don't fall into the priority group. We prioritise people who are likely to benefit from renal transplants, so they get priority, and you've got ischemic heart disease, you've got diabetes. Sorry.'*

So, he goes to the private sector... it's expensive. And the family are paying and it's draining all their resources and he's not getting better. So, ultimately, they say, *'We can't sustain this anymore.'* They

go back to hospital. He says, *'This is an emergency and I have a right of access to healthcare and emergency treatment.'* And the hospital says, *'No, you don't fall into that category.'*

The matter goes to court, and it reaches us and he's dying. And normally with a case like that, that's so ground breaking in so many ways, you want time to hear all the arguments, to do research, to think, to debate. But it's terrible if you give a beautiful judgment after the guy is dead, if he would succeed in what he wants.

So, you could feel the tension in the Court. And I remember I identified so strongly with his counsel, arguing and arguing with that weight on his shoulders. *'My client's life depends on the skill of my arguments.'* And it reminded me of the days in the apartheid era where at times we are facing the death sentence.

#### CHAPTER: THE RESEARCH

Some years earlier, I'd been invited by Harvard School of Law working with Harvard Medical Faculty, to attend a conference on the right to health. And it was when Clinton was first elected, and Hillary wanted to get more adequate healthcare for the American people. That was like the background.

So, there were two Martha's at the round table. Martha Minow who became Dean of the Law School at Harvard, and Martha Nussbaum, a brilliant legal philosopher and thinker. And there was a guy, Roberto Unger from Brazil, a great critical legal scholar, and there were doctors and scientists. It was a marvellous roundtable. And I'm coming up breezily from South Africa, and we have socio-economic rights and Unger is a little bit doubtful that issues that really belong to public debate and parliament should be entrusted to judges.

But he said, *'Maybe in a country like South Africa, where people are so vulnerable, you need a holding period, where the courts can play a particularly important role, in establishing certain norms and standards.'* Really brilliant intervention.

Martha Minow in particular spoke about the right to health, as being not simply a right to healthcare. *'You save more lives through clean water; you save more lives through decent housing, than you do through all the medications and immunisation programs in the world.'* And it also raises the issues of prevention of illness as being part of the state duty. All of these factors had to come in.

## CHAPTER: THE CONCEPT OF RATIONING

The other thing that registered very strongly with me, is when you deal with the first-generation fundamental rights over political rights, in a way they're unqualified. You have a right to vote. You can't have half a vote. You have a right to speak your mind. It can be limited in certain circumstances, the right to organize politically, the right to assemble. They're not rationed. These are fundamental rights that can be restricted in certain circumstances. But when it comes to socio-economic rights, I feel rationing is actually built into the very nature of the right. It's not a limitation on the right. It's using resources, in a way that will maximise the benefits for the greatest number of people, and, it involves ensuring immunisation programs, antiretrovirals, clean water, a whole range of different things. And if all the money goes into super expensive healthcare, then the little kids are being deprived of the sort of preventive health measures that they should have, that's built into the very nature of these rights. And that's hard for lawyers to accept, that rights can be rationed. A right is a right is a right. But for me, the rationing, particularly when, very expensive machinery was involved, became central to the constitutionality. The danger was that all the emphasis would go into super high tech care, for rich people who could afford it, in the most advanced hospitals, and the broad health of the great majority of the people could be neglected.

My late brother Johnny was a doctor, he actually sat on the ANC health committee, raising these social issues while we were in exile, looking forward to a new health policy for South Africa when democracy came. And these are now issues that are circulating in my head. They don't deal directly with the answer to that particular case, but they're part of the background.

## CHAPTER: THE JUDGMENT AND THE RESPONSE

We have to give our decision quickly, without all the research that we would have liked. And you can feel the tension in the court and the law clerks were very, very animated and kind of angry, *'What's the problem? You can find the money somewhere.'*

And, I'm trying to advance a new approach to the right to health, in terms of rationing, based on constitutionally appropriate principles as being central to the nature of the realisation of that right. I'm trying to deal with death, and a strong statement. One of the American judges said, *'Actually, death is a part of life. It's not just suddenly life is over, and nobody has a right to eternal*

*existence...You can't have a right based on that.'* And I actually ended my concurring judgment with the statement like that. Kate O'Regan had just lost her mother, and she said, *'Albie please don't.'* It was like almost too much for her, so I put it earlier in the judgment so that it didn't end on that kind of sombre note.

In any event, we all agree, that Mr. Soobramoney doesn't have a claim under the Constitution of priority access now, to the dialysis machines. Tholie Madala's wife was a hospital nurse and had worked in that area and he introduced some quite interesting material relevant to dialysis treatment. Arthur Chaskalson gave a very poignant judgment, and a famous statement that, given the massive inequalities and unfairness...I'm paraphrasing. In South African life, the proclamation of fundamental socio-economic rights rings very hollow when so many people, because of poverty, just don't have access and don't get the resources.

I felt very strongly that Judges should not be drawn into deciding who gets access to dialysis, who gets the operation, and for a number of different reasons. The one is the pressure on you as a Judge is enormous. It's agonising. Those are pressures that doctors have. They're trained for that. They deal with that. They're prioritising all the time. But more than that, they have ethics committees, and they decide the criteria and the processes, and they determine, and they're much better suited to deciding those things.

It's not to say as a Judge, you don't want to deal with unpleasantness. You have to all the time. It's the nature of the job, but you don't want to create mechanisms that refer to you, to us as Judges, issues where we're not trained, we don't have the balance, we don't have the understanding, we don't know about the priorities.

So, as long as the hospital in this case, had a proper ethics committee, as long as the criteria they used for prioritising met constitutional norms, I was comfortable. It wasn't even that, it was a reasonable procedure, a rational procedure that we shouldn't interfere with. It's more than a rational procedure from the dedicated body.

So how to convey all of those different things, writing in a hurry. We write, we write, we write, we write. And Mr Soobramoney died, I think, one or two days before the judgment came out. Now, if the judgment had been in his favour, imagine the outcry, *'This stupid useless Constitutional Court after his death they say he had a right to treatment...'* And they felt it showed a lack of empathy on

our part. And I would say I felt proud of our Court. I felt absolutely, certain that we were right. I don't always feel certainty, think, *'yeah, we got it right. It's the best we can do.'* But I felt certain... we had to do it. It was important we did that. It's not a question of the law being inflexible and rigid and impervious, and you don't bend. It's not that at all. I don't believe you have to be hard hearted, but you have to have that broader vision, that richer vision, the vision that the Constitution demands. And you're looking at all the people requiring healthcare and the wide dimensions of healthcare and the appropriate points of intervention and so from that point of view, I had no doubt. I think to this day, some of those then young clerks who now are senior lawyers, maybe judges themselves, think that we messed up.

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