



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

THE VAN HEERDEN CASE – VIDEO TRANSCRIPT

CHAPTER: A MORE JUST SOCIETY THROUGH EQUALITY JURISPRUDENCE

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To go on a bit deeper to this issue about when the distinction between differentiation vis à vis unfair discrimination and in our context where resources were distributed in accordance with differentiation unfairly and trying to then redress that kind of structural discrimination, how do we go about implementing these measures without reproducing these very harsh categories that are outdated, that stifle people from being fluid in their identities and moving between worlds? How does equality jurisprudence practically assist us in achieving a just society?

JUSTICE ALBIE SACHS

In a sense, that was the issue that cropped up in the Van Heerden Case. Ooooh, what a case that was. I forget his first name, but Mr Van Heerden, Member of Parliament, and he'd been in the old Tricameral Parliament and got quite a nice pension at the end. That parliament passed the law that amounted to suicide, assisted suicide, of the apartheid parliamentary structures. It allowed for general elections to replace the racist Tricameral Parliament by a parliament voted for, on a common voters' roll, one person, one vote for the first time in South Africa. So, a nice pension sweetened the extinction, if you like. But he noticed the new parliament now granted pensions on a differentiated basis, and it said the new pension scales would be higher for the new members of parliament than they had been for the old members of parliament before. [Mr van Heerden] said, *'that's unfair discrimination. It's basically there to enable the new black members of parliament to get more than I can get because I'm white and only whites were in parliament before and it's unfair discrimination against me, they know what they are doing.'* The Cape High Court accepted his argument and said that's unfair discrimination on the grounds of race.

CHAPTER: WHAT FORM OF DISCRIMINATION IS IT?

And it came to us. We battled over that. Race wasn't officially mentioned, but overwhelmingly, the new members of parliament were black. They couldn't be members of parliament before. Some could've gone into the Tricameral Parliament, which they would've hated as Indian people and coloured people. The reality was that many were elderly, some had been in jail for years, they were towards the end of their lives, they had no pensions, and they were sickened at the idea of this guy who had been passing the horrible laws under which the majority were being oppressed, not only got a good pension then, but he's also going to get a nice, even thicker pension afterwards. And he's okay. Let him be. And there were white members of the ANC, for example, who would benefit, it wasn't only black members.

We argued then amongst ourselves. Dikgang Moseneke felt very strongly. Section 9.2 of the Constitution allows for the state to take measures to remedy, to redress the disadvantage of people who have been disadvantaged in the past... I think it says on grounds of race and gender. He sees it clearly as a remedial action. And he says its justifiable, that's the power the state has. The reality is that it's overwhelmingly black people now for the first time and it's empowered to do that, end of the matter. Yvonne Mokgoro is worried. She feels, first of all, the categories aren't all that clear, but she comes to it via a different route. She says, *'okay, it is discrimination, it does favour black people in practice, but it's not unfair discrimination.'* And on that basis, she would say the pension scheme is okay.

CHAPTER: THEY DISAGREE WITH EACH OTHER; I AGREE WITH THEM BOTH

I look at Dikgang's judgment, I agree with it. I look at Yvonne's judgment, I agree with it. They disagree with each other, but I agree with both of them. My reasoning is you can enter the realm of constitutionalism through different doors, but you come to the same conclusion. You don't have to choose which door. I remember my colleagues were very amused, they said, *'Albie doesn't take sides, he joins both sides although they're classified differently.'* But again, it was my rejection of more formalistic classificatory reasoning.

For me, if you looked at the actual situation of the people concerned, it wasn't people saying, *'because we're black, and we've suffered discrimination in the past, we're entitled to a bonus.'* Or *'we're the majority now, so now it's our turn.'* It was looking at the reality that they were in their 50's, many of them... 40s, 50s. They'd earned nothing. They had nothing saved up. They were now having to abandon the chance of developing a professional career, to go to parliament to serve the people.

And it made a lot of sense; it was very fair to take account of those realities. Now that raised the question of, although race was not mentioned, the impact is clearly on the basis of race, and is it fair to take that into account? Many people argued for a non-racial means - you don't see race at all. If you continue to see race and refer to race, you're reinforcing those categories, and we don't take account of it at all.

CHAPTER: 'IF YOU CAN'T SEE THAT I'M BLACK, YOU DON'T SEE ME'

I remember one black leader from Democratic Alliance, not ANC, saying, *'If you can't see that I'm black, you don't see me.'* It created quite a stir in their ranks. And that's a huge reality in South Africa, that sadly, colour still counts. It impacts, it determines so much about life possibilities, in reality. And if you simply say, *'...non-racialism is our theme, we've got to abolish these categories, you can't refer to them at all'*, you simply get the replication of existing patterns. Basically, it means that whites continue to be in charge of the economy, and large sectors of education, and public life in different ways.

The problem then is kind of two-fold interrelated, as I see it. You don't want to entrench categories of race as determining everything. Particularly when the categories themselves were always artificial. And also, you don't want to... certainly promote inefficiency, incompetence to fulfil quotas. You don't want to undermine the self-worth and dignity of people by making them feel they've got a position simply because of their skin colour. That could be very undermining. And also, white people are people, they're human beings, they're part of the country. You don't want to exclude them, to marginalise them, to make them subjected to new forms of oppression in either a vengeful or disdainful way. We want a country, we want a nation, we want everybody to feel free.

CHAPTER: PROPORTIONALITY - A BALANCING OF FAIRNESS

So, here it becomes a question always of proportionality, a balancing of fairness. In one of our early cases, Mpumalanga Department of Education Case, it didn't deal with race specifically, it dealt with the decision by the then provincial minister of education to stop the subsidies for white kids being bussed to school because there wasn't enough money for the black schools. It was ludicrous that white kids, the farmers' children, could be bussed to school in Pretoria and elsewhere, past the black kids walking barefoot to school - there wasn't enough money for the black kids, it was a privilege for the white kids. But he did it without giving any advance notice. The parents were left bereft before

the exams at the end of the year. So, we said the measure is an appropriate one, but the way he did it was wrong. You've got to give notice, that's fair to everybody concerned so that they can plan for the next year. So, it's not enough then that the objective of the law be a good one, you've got to fulfil it in a way that's fair. The same applies to the application of forms of affirmative action to redress past injustice.

CHAPTER: DIFFERENT ROUTES TO THE SAME CONCLUSION

If you look at the way we dealt with the Van Heerden Case, you'll see that by different routes: Dikgang Moseneke, through the doorway of state action, affirmative action for classes of people who had been disadvantaged; Yvonne Mokgoro, through the doorway of equality, and not unfair discrimination; Albie trying to walk through both doors at the same time. We came up with the same conclusion. And I think it's the distinction. If it had been a kind of corrupt concept by the new parliament, to say, *'now it's our turn, we're black, we're going to take all the cream'*, people would have struck it down. But in the historical context, it was eminently fair, and eminently just. That those who had given their lives fighting for freedom, not because they'd been freedom fighters, but because they had given up other opportunities for securing incomes for the later part of their life. They're not being rewarded for having been freedom fighters, it's acknowledging the fact that because of their fight for justice, and freedom, and getting the new parliament, they had foregone their opportunities, now they should get a richer pension than the apartheid members of parliament got before. I'm quite comfortable looking back today with that outcome.

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