



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

## THE QUAGLIANI CASE – VIDEO TRANSCRIPT

### CHAPTER: EXTRADITION AND THE MOBILITY OF CRIMINALS

THANDI MATTHEWS

Extradition has become a very hot topic at the moment as a consequence of the recent high-profile matter in our media. You dealt with the issue in the Quagliani Case of 2009. And in that you said, *'as important as individual rights are, extradition proceedings cannot be looked at purely from the point of view of protecting individuals from extradition. Transnational mobility of people, goods and services, as well as new technological means, have contributed to increased mobility of criminals.'*

What is the implication of extradition and when does it apply?

### CHAPTER: THE ALLEGATIONS AND CONFLICTING EMOTIONS

JUSTICE ALBIE SACHS

I spent most of my life as an advocate, nearly ten years at the bar in Cape Town, defending people. Defending their rights in an unjust society and doing the best I can. So, my whole heart and thinking was gauged towards the defence. Now, we had a case - came from America, maybe a couple from America, from Australia - and the allegations were these were big time crooks who had fled South Africa and now didn't want to be brought back to face the music. And, in a sense I have these conflicting emotions, that on the one hand this is the new democratic South Africa, people have fair chances, or at least the law is on the side of fair chances, and they must stand trial. And they will wriggle and giggle and do everything possible to avoid it. On the other hand, there have to be certain core basic themes. And I read up, and I study, and I understand the history of extradition, and the criteria that were used.

### CHAPTER: INTERNATIONAL PRACTICE AND PROMINENT CASES

And there's major international practice that has been developed in terms of how these matters should be approached. And we have our own statutes in South Africa. And some very expert counsel were appearing.

The case that's been prominent in the press, as we are talking, of Mr Bester, who, shall we just say was compelled to leave Tanzania to come back to South Africa to face trial - or to go back to jail that he'd escaped from - and face trial on a number of other offences he's alleged to have committed. The analogous case wasn't extradition. It was the Mohamed Case where Mohamed - I've dealt with this earlier, but I'll just recapitulate briefly - was subjected to what the FBI called rendition. Illegal immigrant in South Africa. Gave a false name to get his temporary permit to be here. Taken away to stand trial in the United States for having prepared bombs that blew up the American Embassy in Dar Es Salaam and killed 60, 70 people, the majority Tanzanians. And our Court taking a very strong position that, of course he can be handed over, but it has to be done according to proper deportation proceedings, or according to extradition. These are the two. But neither, we said, had been followed and we said our officials were at fault.

#### CHAPTER: WELL-CONSTRUCTED ARGUMENTS AND THE EXTRADITION ACT

So, it wasn't our extradition law that that was being challenged at that stage. And now we have an extradition law operating in much more, if you like, less dramatic circumstances. And despite hearing very well-constructed and focused argument from counsel for the persons opposing extradition, I felt that the steps taken by our authorities were both compatible with the Extradition Act, and the Extradition Act itself compatible with the with the Constitution. ~~There were all sorts of~~ There was a very wide range of arguments used. They included bilateral treaties and who could issue bilateral treaties. The role of the executive, the role of the president as head of the executive. And I don't remember all the ins and outs, but I came to a very firm conclusion that our extradition law stood up to constitutional requirements and that the extradition orders were valid and should be complied with.

#### CHAPTER: ONE AMUSING, POIGNANT MOMENT

There was one amusing little moment when - amusing, poignant, I don't know what the best adjective is - we had to deal with what were called self-executing treaties and non-self-executing treaties. So, some treaties lay down the requirements on both sides, spelt out. Other treaties simply establish certain criteria and then they had to be invoked to make them operative. So, we would have an extradition act that covered potentially the whole world. But you needed a separate treaty with the United States, with Australia. And was that treaty properly complied with? And how much

discretion did the president have? And did parliament have to ratify the treaties? A lot of big, heavy, heavy weapon, if you like, constitutional issues had to be dealt with one by one.

So, at one stage, in support of a proposition I had about presidential authority, I quoted from a law professor at Berkeley University – Professor Yu. And an American law clerk said, Albie, do you really have to quote this professor? He was the professor who stood by George W Bush in saying that there couldn't be scrutiny of the use of presidential powers, even if the powers were exercised in a way that used torture. And here was now a scholar enlarging the authority of the president to sanction or permit or not crack down on torture. And he [the law clerk] didn't want to tell me what to do. And it wasn't on that issue at all directly.

#### CHAPTER: SHOULD I CHUCK HIM OUT OF MY DECISION?

But should I even quote him? Should I chuck him out of my decision simply because he'd taken a stance supporting Bush on torture relating to a completely different matter? And he [the law clerk] said, in fact, it wasn't completely different. His [the law professor's] argument was an argument in favour of presidential powers having a special role under the American Constitution in ways that the courts had been limiting and restricting. Pentagon Papers cases, secrecy, a whole range of other things. But he said, it's up to me. I took it out. I took it out.

Just speaking about who to quote, my colleague Zak Yacoob - lovely sense of humour - he said he was dying to find a case where he could quote the American extremely conservative Judge Scalia in support of one of his propositions.

#### CHAPTER: STRANGE CONTRACTIONS

And he looked very, very hard at it, and once he got very close to it... just like a sneaky little joke impacting on Scalia. And he said, he got very close in one case, but it just didn't fit. So sadly, none of us quoted Scalia. By the way, I had a good personal friendship with Scalia. We disagreed totally on law. We were both invited to speak in Denmark at the 150th - that was called sesquicentennial of the Danish parliament. And I thought sesquicentennial meant 600 years. And I discovered a paper about the sesquicentennial of the American Constitution, that couldn't be 600 years. And I was going to be a judge in a six-year-old court speaking to a parliament that was six hundred years old! I had to change the whole introduction when I discovered since sesquicentennial means one and a half. And Scalia argued the conservative view, and I argued what's called the progressive view. And he came up to me afterwards and said, '... we both did very well, didn't we? And call me Nino' - I had called him Antonin - '...call me Nino.' So, he was jolly and bright and warm and breezy. And he and Ruth Bader Ginsburg used to go to the opera together. And an opera was even written about that. And, and

when I wrote my book *The Strange Alchemy of Life and Law*, I sent him a copy, asked him to look, particularly when I described the debate we had in Denmark and had I been accurate? And he said ‘... maybe you were a bit inaccurate when you described me as a brilliant judge or brilliant technician, but you've got it absolutely right.’ He was very generous and flattering. A ‘tour-de-force’.

And these are some of the strange contradictions that you get. And yet his decisions restricted the rights of women, restricted the rights of people of colour, restricted the rights of people whose sexual orientation was different from his. You know, the impact was very, very grave. But, you know, we are functionaries. We work in a world; we have independent voices on the courts. And in his case, he was just very, very, very engaging. And I was comfortable at a purely professional level to be friendly with him. So, when I would go up to the US and Ruth Bader Ginsburg would invite me to meet her law clerks, she would always invite Nino to come and join us. And then afterwards Stephen Breyer. And then afterwards, Sonia Sotomayor.

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