

Book Review
Compte rendu

The Strange Alchemy of Life and Law

Albie Sachs
Oxford University Press, 2009, 320 pages

Reviewed by Michael Lynk *

More than we may think, the legal systems in Canada and South Africa share some significant similarities. Beyond the dramatically different societies and the separate paths to democracy, our two legal systems have been shaped by both English and continental traditions, our respective constitutions have been substantially re-written in recent years to entrench progressive bills of rights, and truth and reconciliation commissions have been established in both countries to address some of the historical inequities inflicted upon indigenous peoples.

Most demonstratively, contemporary constitutional reforms in Canada and South Africa have assigned to our respective judiciaries the responsibility to discern the underlying values and purposes in the fundamental law, along with the considerable remedial authority to strike down incompatible legislation and government actions. As part of this legal revolution, the courts in both countries have developed new forms of constitutional reasoning that rely upon human dignity, proportionality, equality and protection of minority rights as their animating spirits. Not surprisingly, the Supreme Court of Canada and the Constitutional Court of South Africa pay regular attention to each other's judgements on fundamental rights, a practice unthinkable only twenty years ago.

Mr. Justice Albie Sachs, a prominent legal activist in the anti-apartheid struggle who became one of Nelson Mandela's first judicial appointments to the new Constitutional Court in 1994, has written a fascinating meditation on the role of law and the courts in addressing the myriad of social problems inherited by the new South Africa. In *The Strange Alchemy of Life and Law*,¹ Sachs uses judicial milestones from his fifteen years on the Court (he retired in 2009) to explore how a modern charter of rights might be employed to tackle some of the desperate inequalities in his beloved country.

But the book, in many wonderful ways, is about much more than the workings of the courts in post-apartheid South Africa. Infused by Sachs'

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¹ (Oxford: Oxford University Press, 2009) [*Strange Alchemy*].

wit and flair, intellectual rigour, personal courage and remarkable life experiences, *Strange Alchemy* is also an exploration into the intricacies and paradoxes of judicial decision-making, an astute rumination on activist courts, an inquiry into how socio-economic rights can be articulated through a modern constitution, and an enlightened appreciation of the evolving relationship between legislators and judges in a constitutional democracy. Above all, it is an argument that law without humanity and justice is an empty vessel.

Sachs' personal history would be extraordinary even if he had not become one of modern South Africa's best-known and most erudite judges. As a young lawyer in the early 1960s, he was imprisoned, placed in solitary confinement and tortured by the South African government for his anti-apartheid activism; the *Jail Diary of Albie Sachs*² was subsequently dramatized by the Royal Shakespeare Company. Forced into exile in 1966, Sachs became a law professor in England and later in Mozambique while acting as a legal advisor to the leadership of the African National Congress (ANC). In 1988, Sachs lost his right arm and an eye from a car bomb planted by South African security agents in Mozambique. Musing in *Strange Alchemy* as to why he had been targeted, as he had not been involved in military operations or underground activities, Sachs wryly writes that: "Every intellectual dreams of being taken seriously, but not that seriously ..."

Imprisonment, a lengthy exile and an almost-successful assassination attempt would be enough to embitter the most generous of hearts. But Sachs' better angels led him to a different kind of revenge:

If we got democracy in South Africa, I came to write, then roses and lilies would grow out of my amputated arm. And that would be my soft vengeance. Soft vengeance was powerful. The vow that I had made in solitary confinement was redeeming itself in my life, not as an ideological mechanism to smite others, but as a philosophical and emotional guide pointing to the kind of person I wanted to be, the kind of country I wanted to live in, and to the sort of Constitution I wished to live under.

Returning to South Africa in 1990, shortly after Nelson Mandela's release from prison, Sachs played a pivotal role in the negotiations for the new South African constitution and the subsequent establishment of the historic Truth and Reconciliation Commission. Then came his appointment to the Constitutional Court (which was built by the new South African government on the site of the notorious Old Fort prison in Johannesburg that had held, at different times, Nelson Mandela and Mohandas Gandhi

² (London: Harvill Press, 1966).

as political prisoners). As is evident from *Strange Alchemy* and his published judgements, Sachs possesses a refined judicial temperament that is equal parts dispassionate and compassionate, logical and experiential. His judging instincts are also shaped by what might be called an unromantic optimism: “[W]hile one should always be skeptical about the law’s pretensions, one should never be cynical about the law’s possibilities.”

Judging at its best is guided not only by logic and adherence to established legal principles, but also by experience, engagement and even passion. Citing the great American jurists Benjamin Cardozo and William Brennan, Sachs argues that a judge’s awareness of his intuitive and passionate responses, and openness to the range of human experiences, are a necessary complement to the logical and rational features of the judicial process. The dialectic between reason and passion, far from tainting the role of the judge, is central to its vitality. For Sachs, this is not to surrender judicial decision-making to personal taste and subjectivity, but rather for judges to acquire an “enlarged mentality” that connects the law to the social values which infuse and shape the wider society:

Giving reasons for what we do is not the same as engaging in pure reasoning. Though the use of hard logic is part of the reasoning process, it is only a part. Good and convincing legal reasoning will inevitably be informed by experience and derive its vitality and sustainability from its congruence with life.

Books and memoirs by judges are rarely remembered for their dramatic tension. *Strange Alchemy* is an impelling exception. As a window into the experiences that have shaped his judicial philosophy, Sachs’ chapter on South Africa’s reconciliation process, which begins with his unexpected encounter with a former intelligence officer from the apartheid era who had been involved in the operation to assassinate him in Mozambique, is both revealing and reflective. The former officer showed up one day at Sachs’ judicial chambers, unbidden, explaining that he was planning to testify at the Truth and Reconciliation Commission about the assassination plot in a bid to receive a legal amnesty. From this encounter, Sachs turns to the impact that the Commission had on South African society during the pivotal transition period to democracy. In his eyes, the TRC succeeded because it responded to an intense social need in South Africa to develop alternatives to the judicial process that could come to terms with the profound trauma and violence inflicted during the apartheid era:

What both the Constitution-making process and the TRC had in common was recognition of the need for fierce antagonists to look into the eyes of former enemies and discover elements of a common humanity there ... Dialogue is the foundation of repair. The dignity that goes with dialogue is the basis for achieving common citizenship.

At the chapter's end, Sachs describes bumping accidentally into the former intelligence officer at a party, where the officer tells him about his cathartic experience with the TRC process. Soft revenge at work.

An illustrative example drawn in *Strange Alchemy* about the non-linear effect of life experiences on the judicial mind is the constitutional protection of religion in a secular and constitutional democracy. Sachs is a steadfast atheist, but also one who possesses a strong set of personal beliefs with “overwhelming ethical implications.” A life actively engaged through and with his core values – secularism, democracy, equality, and a hatred of oppression – has fostered in him a strong respect for the spiritual beliefs of others. Fiercely acknowledging the place of religion in a secular society, Sachs has sought productive compromises between the two, whether in his role as a principal drafter of the new South African constitution or, thereafter, when deciding cases under it. “Religion is not just a question of belief or doctrine. It is part of a people’s temper and culture, and for many believers a significant part of their way of life.” In *Christian Education South Africa v. Minister of Education*,³ a landmark 2000 judgement by Sachs on religious freedoms, he wrote that a democracy can coalesce only if all of its participants accept certain basic norms and standards as binding, which restrains religious believers from claiming an automatic right to be exempted from the laws of the land. At the same time, Sachs ruled, the state has an obligation, wherever reasonably possible, to avoid placing believers in the burdensome position of choosing between their faith and their duties as a citizen.

The fruition of this balancing approach came in *Minister of Home Affairs v. Fourie*,⁴ the 2005 ruling of the Constitutional Court authored by Sachs which made South Africa the fifth country in the world, and the first in Africa, to recognize the right to same-sex marriage. In *Strange Alchemy*, Sachs writes about the judicial challenge that the issue posed on how to ensure a mutually respectful co-existence between the sacred and the secular within the same public space. As in Canada, much of the intense opposition to the claim for same-sex marriage came from South Africa’s many religious communities. And as in Canada, the response of the Constitutional Court of South Africa was to uphold the right to marriage for gays and lesbians, while protecting the right of churches, mosques and synagogues not to celebrate unions that violated their beliefs. Looking back on *Fourie*, Sachs reflects:

³ 2000 (4) SA 757 (CC).

⁴ 2006 (1) SA 542 (CC).

It underlines the fact that religion has to be taken seriously, and the beliefs of the people acknowledged and respected as part of the public realm. But the law had to acknowledge the undeniable, incontestable claims of gay and lesbian couples to celebrate in a public way, with the State's support and backing, their relationships, their intimacy, their love, their feelings for one other – that was their human right protected by the Constitution.

One area where South Africa may be blazing a new constitutional path has been in the realm of socio-economic rights. In Canada, we have had only a muted judicial debate – exemplified by the Supreme Court of Canada's 2002 judgement in *Gosselin v. Quebec (Attorney General)*⁵ – on whether socio-economic rights can be protected by the indefinite language of section 7 of the *Canadian Charter of Rights and Freedoms*.⁶ The South African Constitution, in contrast, explicitly entrenches fair labour practices (section 23), a sustainable environment (section 24), housing (section 26) and health care, food, water and social security (section 27). Other constitutions also contain socio-economic rights in their constitutions – Ireland and India are two examples – but the courts in those countries have treated such provisions as non-justiciable and directatory. The prevailing legal view throughout the twentieth century has been that courts are institutionally unsuited to adjudicate constitutional challenges grounded on socio-economic rights, because they lack the expertise, the political temperament and the democratic legitimacy to decide questions going to housing, hospitals and the allocation of public spending.

A worthy point, Sachs responds, but courts that interpret a modern constitution now possess an expertise in human dignity and fundamental equality, and these tools are integral to making a constitutional bill of rights into a living document for the dispossessed and the marginalized of a country. The particular direction taken by the Constitutional Court, shaped mightily by South Africa's experiences over the past sixty years, is that freedom and bread are inseparable. In Sachs' words:

The restoration of dignity for all South Africans accordingly required both the development of increased respect for the personality rights and freedoms of each one of us and the creation of material conditions for a dignified life for all.

The 2000 case of *Government of the Republic of South Africa v. Grootboom*⁷ has become the defining constitutional judgement for socio-

⁵ [2002] 4 S.C.R. 429.

⁶ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11.

⁷ 2001 (1) SA 46 9CC).

economic rights in South Africa and beyond, hailed by many and disparaged by many others. Mrs. Grootboom and her children, along with several thousand other adults and children, built makeshift huts without permission on public land near Cape Town that had been designated for low-cost housing. After the municipality bulldozed their hovels, the squatters found a sympathetic lawyer to launch a constitutional challenge against the municipality's refusal to provide them with temporary accommodation until the low-cost housing project could be completed. Sachs, in *Strange Alchemy*, writes that taking constitutional socio-economic rights seriously means avoiding the temptations of both judicial populism ("securing favourable headlines as a champion of the poor") and judicial formalism ("showing a passive and uncaring attitude to the real lives of actual people"). Rather, the appropriate approach, he argues, would be to provide "a principled analysis and remedy that would be consonant with our limited institutional capacity, and yet be capable of meaningful enforcement."

In *Grootboom*, the Constitutional Court acknowledged that legislatures have a special expertise in matters of public policy and their decisions ought to be granted significant deference by the judiciary. However, the Court went on to rule that governments also have an obligation to take "reasonable legislative and other measures" to progressively realize the various socio-economic rights protected by the South African Constitution. While the state government's general public housing policy was reasonable, the Court found that the government's specific failure to develop a comprehensive plan that would provide accommodation for homeless people in situations of extreme desperation, such as Mrs. Grootboom and the other Cape Town squatters, breached the Constitution. Sachs joined in an unanimous judgement which held that the state did not "make reasonable provision within its available resources for people ... with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations." Although *Grootboom* did not bring the promised land to South Africa's destitute – Sachs notes at *Strange Alchemy*'s conclusion that Mrs. Grootboom died in 2008 without ever being able to move from her shack to a brick house – the ruling has become a seminal precedent that the Constitutional Court has relied upon in other cases on socio-economic rights in the 2000s, such as the 2002 decision in *MEC for Health, KwaZulu-Natal v. Premier, KwaZulu-Natal: in re Treatment Action Campaign*⁸ where it struck down the South African government's notorious restrictions on anti-retroviral drugs for the treatment of persons with HIV and AIDS.

⁸ 2002 (5) SA 717 (CC).

Strange Alchemy is both acutely particular to South Africa and immensely relevant to the emerging global constitutional dialogue. It is a book with a deep underlying paradox: the elegant, humane and engaged judgements written by Sachs and his judicial colleagues contrast with the staggering social problems of South Africa for which the law can provide, in many cases, only inadequate answers. Yet, it is also a book that persuasively infuses the analytical optimism of its author with lessons for the broader constitutional world; for Sachs, the sinews of our modern rights – in South Africa and elsewhere – come from the foundational principle of human dignity, and its possibility of embedding judicial understanding of, and concern for, the human condition in all its diversity. Much of this will be, at the very same time, both familiar and revelatory for Canadian judges and lawyers. Indeed, Canada may be continents away from South Africa, but, as *Strange Alchemy* intimates, our constitutional shores have never been closer.