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The Rule of Law and TRC Process in South Africa

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Abstract
This paper is drawn from an unpublished doctoral thesis *'Speaking Truth to Power and the Work of Albie Sachs'*. It endeavours to undertake a limited exploration of some of the implications of Albie Sachs' role for embedding the legitimacy of the rule of law in South Africa. It also seeks to analyse some its interactions with the Truth and Reconciliation process and explore the contestation of the concept of the 'rule of law'. More specifically, it attempts the consideration of what was a distorted but legalised distribution of power brought about by a warped social system, backed by strong-willed security forces that South Africa presented and also goes on to consider the consequences of the Truth and Reconciliation Commission for South Africa's political system. [1] It raises the question of whether this impacts on the development of a human rights culture in South Africa.

Historically South Africa in an effort to put its past firmly behind, 'power' within it constructed the Truth and Reconciliation Commission process using it as a model for reconciliation and nation building.[2] The origins of this could be situated within the setting up of the ANC's own internal commissions of enquiry, the Stuart, Skweyiya and Motsuenyane Commissions to address its own internal violations of human rights. These had formed the basis on which the Truth and Reconciliation Commission (TRC) was set up. The reports of the Commissions confirmed that gross human rights violations had taken place within the ANC camps. It is these reports that eventually prompted the promise to set up the TRC, which came into being after the transition to multi-party democracy.[3]

Following a period of *truth recovery*, the TRC, in October 1998 presented its final report to President Mandela.[4] In the report it buttresses the argument about its attempt to put the past behind.

The President in response made some attempt to locate within the establishment of the TRC, the creation of a process, which allowed people to penetrate the thoughts and objectives of those who inhabited the power structures. It also drew from various views and positions on why its establishment was considered necessary.[5] This position can be explored with the knowledge of the argument advanced by some that South Africa was faced with the use of a legal framework for what was essentially a spiritual/psychological process.[6]

The process, however, could not be successful if it was considered illegitimate by the people. I suggest that legitimacy is about the people, including their interests, consent, value system and will. It could therefore be argued that every law including the constitution must pass the test of legitimacy to have force. We may venture further to suggest that the people in a republic are the superior force of the land. That any law, including the constitution, which fails the test of legitimacy, will lose its power and if it remains unrepealed the people may under the doctrine of necessitas no habet legem ignore it by civil disobedience or revolution.

It is in light of the above we explore the preamble of the Constitution of the Republic of South Africa 1996 as adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly. The paper seeks to argue that this forms a starting point in the legitimacy process, particularly the section that recognises and acknowledges the past, where the draftsmen express the desire to reconcile the past with the present and bring together these together as a basis for healing a divided and traumatised society and, also as a means of improving the quality of life of all citizens and in the process freeing the potential of each individual. That

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1 Corder, Hugh (2010)., *Challenges to the Rule of law in South Africa* download on 11th October 2013 from http://wwww.freedomunderlaw.org/wp-content/files/Challenges_to_the_Rule_of_Law_by_Prof_ Hugh_Corder.pdfHugh

2 Ojedokun, Olu (2003)., *Interview with Jewish members of the audience at the Jewish Book Festival 2003:*
At the Jewish Book festival in March 2003 I was opportuned and honoured to be part of a group discussion with some other elderly Jews. My contribution/question to them was simple. If they had been a Truth and Commission style hearing rather than a Nuremberg hearing would they have been healing, would it have made any difference? They thought that it might because for a lot of them after the trials of a few figure heads the atrocities were swept under the carpet and it is now this next generation that has to deal with it.

3 *Truth and Reconciliation Commission of South Africa, Volume One* (1998); Oxford: Macmillan p. 52

4 Mandela, Nelson (2004); *In His Own Words From Freedom to the Future Tributes and Speeches Asmal, Kader* et al pp 133 -136.

5 Boraine, Alex (1996); *Op Cit*

6 Storey, Peter (1994); Paper presented at The Centre for the Study of Violence and Reconciliation conference on 18 August 1994: *Making Ends Meet: Reconciliation and Reconstruction in South Africa,* World Trade Centre, Johannesburg

position also seems to be reinforced by the *Act No.34 of 1995: Promotion of National Unity and Reconciliation Act 1995*. The act lays down the legal framework for the functioning of the Commission, providing for the investigation and establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed during the period from 1 March 1960 to the cut-off date contemplated in the Constitution. The implication of these two statutes and indeed others grounding the work of the Commission is the creation of a situation where the South African society simply says to the perpetrators and collaborators of apartheid confess all, your sins are forgiven and there is reconciliation. If this is the case then we must be asked by what means exactly did the Commission hope to verify without powers of the law courts that all truth had indeed been confessed? There is doubt whether this can be answered, since it is argued that *truth claims* in themselves do not flourish in a climate of genuine knowledge, but in a climate of power.[1] John Eldridge argues that there is also the problematic of dealing in a world of unassailable facts, not with provisional accounts.[2]

In order to explore in further detail some groundings of the Truth Reconciliation Commission reference is made to some of the views of its members. Pumla Gbodo-Madikizela, who was a member of the TRC's Human Rights Violation Committee, asked:

'Why is it necessary to lift the veil from our past? Why not simply erase the page and start all over again?'

Her attempt to answer the question refers back to the enabling act,[3] which enjoined the Truth and Reconciliation Commission to ensure the restoration of dignity to people who have suffered pain and loss through atrocities of the past. She goes on to add that:

'The Truth and Reconciliation Commission starts with the assumption that the truth will heal and rebuild a shattered past'.[4]

Some commentators in comparing this model with those of other nations have raised the question whether the South African experiment seems to have been built upon the condition that power engages truth with a view to engendering reconciliation.[5] While others have chosen to describe it as a mechanism perceived by the South African elite as the most effective way to mend their wounds of the past and a means of moving forward in an era of majority rule.[6]

This brings us to the question whether the Truth Commission can be said to be based on a number of presuppositions about political psychology among which is that knowledge promotes forgiveness and that reconciliation flows from truth, and that these were used as a mechanism to exercise control over the agenda in ways which kept potential issues out of the political/decision making process. That is, public exposure of the power behind truth was avoided.

However, this does not fully address issues of legitimacy provoked with the creation of the Truth Commission. Some claimed that international law and convention forbade granting amnesty for crimes against humanity as well as torture and similar offences. Their slogan was: '*No amnesty, no amnesia, justice'.*[7]

This issue of the legitimacy of the 'rule of law' also arose from a direct challenge to the whole truth and reconciliation process in the case of Azanian Peoples Organisation (AZAPO) and others v President of the republic of South Africa, which was brought before the South African Constitutional Court. It is suggested that these related to the problems relating to the amnesty provisions as laid down in the Act setting up the Commission. There are those in South Africa, some organisations and individual families, who had suffered very grievously from human rights violations who believed that there ought to have been no amnesty provisions whatsoever. They wanted nothing more and nothing less than trials, prosecutions and punishment. More especially they were concerned that in term of the Act those who applied for amnesty and were successful will never again be liable, either criminally or civilly. Some were even prepared to accept that even if amnesty had to be granted as the price for peace and stability in South Africa there still ought to be an opportunity to bring civil action against the organisation, the state or the individual.[8] In that case the constitutionality of the section was

1 See Havel, Vaclav (1987); *Living in Truth*. London: Faber. p.156 -202 in Vardy, Peter (1999) (ed)., What is Truth? Sydney: University of New South Wales Press

2 Eldridge, John (1993); *Getting The Message News, Truth and Power* London and New York: Routledge p 5

3 Promotion of Nationality Unity and Reconciliation Act 1995 No 34 of 1995

4 Gobodo-Madikizela, Pulma (1996); *Re-enactment of Old identities & implications for Reconciliation* read at the 40th Annual Convention of the institute of Personnel Management, 21-23 October 1996, Sun City

5 *Strategic Choices in the Design of Truth Commissions (2003s. 2 May 2002* avaliable at [http://www.truthcommission.org/commission.php?cid=3&case_x=0&lang=en

6 Gunnar, Theissen (1997)., *Between Acknowledgement and Ignorance: How white South Africans have dealt with the apartheid past.* Johannesburg: Centre for the Study of Violence and Reconciliation. para 1.1 - *The Impact of Political Culture on the Consolidation of Democracy*.

7 Verwoerd, Wilhelm (1997)., *Justice after Apartheid? Reflections on the South African Truth and Reconciliation Commission available at* [http://www.truth.org.za/reading/justice.htm]

8 *Azanian Peoples Organisation (AZAPO) and others v. President of the Republic of South Africa, Constitutional Court,* http://www.icrc.org/ihl-nat.nsf/0/067632d55386102cc1256b09003f0eac?OpenDocument . The relevant summary of the case is as follows: *"The applicants applied to the Constitutional Court for an order declaring section 20(7) of the Promotion of*

upheld. The Court conceded that the section limited the applicants' right to *"have justiciable disputes settled by a court of law, or . . . other independent or impartial forum"*. However, it considered that the epilogue to the interim Constitution (the **"National Unity and Reconciliation"** section) sanctioned the limitation on the right of access to courts.[1] The decision of the Court confirmed the legitimacy of the process but in doing so put into effect the denial of the normal due process of access to the law courts to the victims of human rights abuses.
The dilemma faced was simply that if people are encouraged to apply for amnesty but remained liable in a criminal court or in a civil court, what is the incentive for their coming forward? The application did not succeed in court.

Dr. Borraine, the Vice Chairman of the South African Truth and Reconciliation Commission argues that within the restraints of a negotiated settlement major compromises had to be made and he believed that South Africa's Truth and Reconciliation Commission has achieved the best possible outcome.[2] South Africa has decided to say no to amnesia and yes to remembrance; to say no to full-scale prosecutions and yes to forgiveness. Those who have committed violations of human rights will, if they applied for amnesty, in most instances go free. In South Africa's circumstances where there was no victor and vanquished, it really has no other alternative but to follow this route. It should be borne in mind, however, that the administration of the justice process continues. Already there have been prosecutions and there will obviously be more. And if perpetrators declined to apply for amnesty they face the possibility of prosecution at some future date. But it did raise the question of how many such trials can South Africa afford, not merely in financial terms but in the damage that this can do when skeletons constantly fall out of the cupboard, bringing with them further divisions and recriminations. Indeed what occurred above appears to confirm that power in South Africa deliberately decided to make some exception to the application of the rule of law in other to facilitate a reconciliation process. How does that seeming expediency affect the legitimacy of the rule of law?

The Legitimacy of The Rule of Law and the TRC

The concept of the rule of law remains much contested[3] and it could be argued that it acquires its legitimacy from the principle that no society can survive without some form of regulatory rules to which its members must submit. Professor Roscoe Pound argues that these are "enforceable rules of conduct prescribed by law making authority and Professor Akintunde Emiola seeks to establish the link between law, its administration, and life of the society.[4] The concept of the rule of law simply means, *"everything must be done according to law."* The rule of law is opposed to the arbitrary use of power. Where does this place the Truth and Reconciliation process and use of power which some claimed was arbitrary as a utility tool which focused on prudential justice and then ensured a stable climate was created? However, the legitimacy of the Truth and Reconciliation process relies on its acceptance by the people as legitimate. This paper has already suggested that legitimacy is about the people, including their interests, consent, value system and will. It has advanced the position that every law including the constitution must pass the test of legitimacy to have force. Once a law loses its legitimacy and remains unrepealed the people may under the doctrine of *necessitas no habet legem* ignore it by civil disobedience or revolution.

Tom Syring clearly articulates the points of difference between the law courts and the truth commissions in the following terms. That whereas the main form of accountability provided by courts of law is the imposition of sentences, truth commissions are chiefly concerned with rendering a moral judgment about what, in general, was wrong and unjustifiable, and thus help to 'frame the events in a new national narrative of

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National Unity and Reconciliation Act unconstitutional. Section 20(7) permits the committee on amnesty established by the Act to grant amnesty in respect to any act, omission or offence provided that the applicant concerned has made a full disclosure of all relevant facts, and provided further that the relevant act, omission or offence was associated with a political objective and committed prior to 6 December 1993. As a result of the granting of amnesty, the perpetrator is relieved from criminal or civil liability. The State or any other body, organisation or person that would ordinarily have been vicariously liable is also relieved from liability. The constitutionality of the section was upheld. The Court also considered the argument that the State was obliged by international law to prosecute those responsible for gross human rights violations and that the provisions of section 20(7) authorising amnesty for perpetrators constituted a breach of the Geneva Conventions of 1949…… The Court held that it was doubtful whether the Geneva Conventions and their Additional Protocols applied at all to the conflict. In any case, Additional Protocol I was not binding on South Africa and Additional Protocol II actually encouraged the authorities in power to grant amnesties after the end of hostilities. The Court held further that international law distinguished between international and non-international armed conflicts. For the latter category there was no obligation to prosecute those who might have performed acts of violence or other acts, which would ordinarily be characterised as serious violations of human rights.

1 *Op Cit.*

2 Strategic Choices in the Design of Truth Commissions. *Op Cit.*

3 Rosenfeld, Michel (2001); The Rule of Law and Legitimacy of Constitutional Democracy Cardozo Law School Public Law Research Paper 36 Available at SSRN: http;//ssrn.com/abstract=262350 or http://dx.doi.org/10.2139/ssm.262350[l

4 Emiola, Akintunde (2011); Remedies in Adminstrative Law Second Edition Ogbomosho p 13

acknowledgment, accountability, and civic values', he recognises that both approaches share the recognition that reconciliation is a necessity for coming to terms with a dreadful past and being able to move on with the future.[1] However, as we previously indicated some victims of apartheid in South Africa saw the Truth and reconciliation process which resulted in granting of amnesty to many perpetrators as an attempt to deny them of their legitimate right to access justice. In that case, the applicants applied to the Constitutional Courts for an order declaring section 20(7) of the Promotion of National Unity and Reconciliation Act unconstitutional. Section 20(7) permits the committee on amnesty established by the Act to grant amnesty in respect to any act, omissions or offence provided that the applicant concerned has made a full disclosure of all relevant facts, and provided further that the relevant act, omission or offence was associated with a political objective and committed prior to 6 December 1993. As a result of the granting of amnesty, the perpetrator is relieved from criminal or civil liability. The State or any other body, organisation or person that would ordinarily have been vicariously liable is also relieved from liability. The constitutionality of the section was upheld. The Court also considered the argument that the State was obliged by international law to prosecute those responsible for gross human rights violations and that the provisions of section 20(7) authorising amnesty for perpetrators constituted a breach of the Geneva Convention of 1949. ……. The Court held that it was doubtful whether the Geneva Conventions and their Additional Protocol II actually encouraged the authorities in power to grant amnesties after the end of hostilities. The Court held further that international law distinguished between international and non-international armed conflicts. For the latter category there was no obligation to prosecute those who might have performed acts of violence or other acts, which would ordinarily be characterised as serious violations of human rights.[2]

The South African Court's ruling on the constitutionality of the Act generated some controversy; the above reveals a glimpse of its extensive judgement. It attempted to lay down the grounds for the legitimacy of power engaging truth.[3] It may be argued, however, that the courts initially played a part as one of the instruments of power, exercising control over the agenda in ways, which kept potential issues out of the political process. The case summary is covered in the endnote below previously cited. It is noted that:[4]

"The constitutionality of the section was upheld. The Court conceded that the section limited the applicants' right to "have justiciable disputes settled by a court of law, or . . . other independent or impartial forum." However, it considered that the epilogue to the interim Constitution (the "National Unity and Reconciliation" section) sanctioned the limitation on the right of access to court".

What are the consequences of the TRC for the legitimacy of the rule of law and ultimately South Africa's political system? The TRC was reported to have made few friends in South Africa. Many victims were aggrieved because popular expectations were not met while some saw the entire process as a witch-hunt. It was even argued that the TRC would have a negative impact on the rule of law and that it would in effect sustain the argument that this was the use of power to set and control the agenda.[5]

Tom Syring notes that in 1995, the South African parliament enacted the Promotion of National Unity and Reconciliation Act 23, which in its preamble deems it:

"Necessary to establish the truth in relation to past events as well as the motives for and circumstances in which gross violations of human rights have occurred, and to make the findings known in order to prevent a repetition of such acts in future. Such considerations are founded on the 'eternal hope that exposure of the past will be enough to prevent its repetition in the future".

He asks: But is it enough? Is it at all an effective measure in the fight against future (and past) miscreants? Is it reasonable to expect the cycle of political violence to be broken under a regime of impunity? In some cases, public hearings have resulted in 'the emotional healing necessary to "turn the page without closing the book", as may be exemplified by the parents of murdered human rights worker Amy Biehl, who publicly forgave the Azanian Peoples Liberation Army (APLA) killers of their young daughter. Knowledge of the past may have contributed to healing the wounds of the past, 'But it would be naive to contend that truth has brought reconciliation with it. Many victims demand retribution', and the fact that Amy Biehl's parents were seemingly able to forgive the killers is not necessarily connected with the revelation of the truth but rather due to some inherent qualities of the parents' character.

He saw another shortcoming of truth commissions as having the potential for them to be used by those

1 Syring, Tom (2013); Coping with Peace: Truth Commissions, Courts of Law and the Pursuit of Justice available on 1st November 2013 from <http://mams.rmit.edu.au/9hhnyyyp6p4r.pdf>

2 *Azanian Peoples Organisation (AZAPO) and others v. President of the Republic of South Africa,* Constitutional Court, 27 July 1996 http://www.icrc.org/ihl- nat.nsf/0/067632d55386102cc1256b09003f0eac?OpenDocument

3 *Azanian Peoples Organisation (AZAPO) and others v. President of the Republic of South Africa,* Constitutional Court, 27 July 1996 *Op Cit*

4 *Ibid.*

5 Michel Foucault (1998)., *The Will To Knowledge The History of Sexuality.,* Volume 1. trans. Robert Hurley., London: Penguin Group., pp.86-7: *'He argued that power determines truth. He also said that power is most effective when it is concealed.'*

responsible for previous perpetration so as to meet public demands with respect to investigations while avoiding their own formal prosecution. 'Truth' may thus become a bad alternative to 'justice', as a culture of impunity may be fostered where members of the previous authoritative regime are able to stay in power. He argues that this may lead to a kind of false reconciliation with the past, the prevention of which was the very goal of establishing a truth commission in the first place. Furthermore, does peace in the sense of no repetition of past crimes actually result?

He cites the case of Guatemala, where after the government and the guerrillas had negotiated an end to the civil war in 1997, two truth commissions—one sponsored by the United Nations and one by the Roman Catholic Church—were preparing their reports. The church published its findings in 1998 under the title Guatemala: Nunca Más. It documented the extent, mechanisms, and impact of state terror. Shortly after publication, Bishop Juan Gerardi, director of the project that was in charge of writing and publishing the Nunca Más report, was murdered in his home. The peace terms were negotiated independently of the outcome of the truth commission and thus—at least in the Guatemalan case—the truth commissions did not result in peace by themselves. They are seldom sufficient to dismantle the structures of power and impunity behind the human rights violations. Neither can it be asserted that their reports contribute decisively to preventing the repetition or continuation of (political) murder and other serious violence. It therefore can be suggested that Truth commissions does not always bring peace or enhance the legitimacy of the rule of law.

In South Africa's case how can the court's denial of legitimate grievances of victims engender a culture of the rule of law and the protection of human rights? To explore this further the papers revisits an interview held with Albie Sachs, which came out of the fieldwork used in a doctoral thesis, however, he presents a different argument in his paper on *'South Africa's Truth and Reconciliation Commission'*, where he argues that:[1]

"Yet our court does not express power,[2] it restrains power. Our job is to defend the new Constitution, to ensure that all the agencies of society, all public institutions, function in terms of the processes laid down by our Constitution and respect the values enshrined in it".

He goes on to say that the underlying values of South Africa's new democracy are spelled out in their Bill of Rights and in the very concept of equal citizenship, which presupposes not only negative protections against abuse by public power, but also affirmative claims to a decent and dignified life for all. He considers the foundation of their work, in the court, as accordingly, respect for the humanity of the least amongst us. He says:
"The Court is required expressly to promote the values of an open and democratic society. Such a society acknowledges the equal worth and dignity of each of its members and respects difference in society. The universalism of human rights comes from the universality of struggle and idealism".

However, the facts do not always appear to support his argument, see the reference to the recent role of the South African Constitutional Court in a recent case where it asked the government to change its massive low-cost house building programme after a group of 1,000 former residents of a squatter camp forced out by terrible living conditions, brought a case the immediate right to adequate housing. The justices ordered that the long-term solution of building million of houses would have to be accompanied, and perhaps delayed, by emergency provision for the poorest members of society. [3]

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1 Sachs, Albie (1973) ., *Justice, South Africa's Truth and Reconciliation Commission available at.* [http://lawreview.uchicago.edu/issues/archive/v67/spring/commission.html]

2 *Cf.* See Lenta, Patrick (2004) *Judicial Restraint and Overeach.*
p. 555 available at [http://search.msn.co.uk/results.aspx?q=ALBIE+SACHS+AND+NEUTRALITY+OF+JUDGES&FORM=QBRE]

3 *Cf.* In his paper *Justice, South Africa's Truth and Reconciliation Commission*, Albie Sachs argues that South African courts do not *express power*, it restrains it. However, within this argument appears to exist a contradiction, that it restrains yet it is expected to affirm. How does it do that without expressing power? The facts do not even appear to support his argument , see the recent role of the South African Constitutional Court in a recent case where it the government to change its massive low-cost house building programme after a group of 1,000 former residents of a squatter camp, forced out by terrible living conditions, brought a case claiming the immediate right to adequate housing. The justices ordered that the long-term solution of building millions of houses would have to be accompanied, and perhaps delayed, by emergency provision for the poorest members of society.'
Albie Sachs says:
'*We have rather timidly, rather reluctantly, picked up the judicial pen and started writing. Once you start doing it, you start enjoying it.'*
He acknowledges the differences between the role of the judiciary in South Africa, where a strong and broad bill of rights is seen as vital to reconciling majority rule with all sections of a badly divided society, and its place in societies with firmer democratic foundations.
Bunting, Chris (2000) *'What a bit of dignity teaches us'***.** Times Higher Education Supplement, November 2000 [Available at http://www.chrisbunting.net/sachs.htm]. This is a court on the offensive rather than on the defensive as Justice Albie Sachs would argue in his paper.

His response to this is to say:
"We have rather timidly, rather reluctantly, picked up the judicial pen and started writing. Once you start doing it, you start enjoying it".[1]

He acknowledges the differences between the role of the judiciary in South Africa, where a strong and broad bill of rights is seen as vital to reconciling majority rule with all sections of a badly divided society, and its place in societies with firmer democratic foundations.[2]

Sachs' mediation on the judicial function which includes its role in relation to the protection of human rights expresses a tension at the heart of the judicial role in a newly democratic jurisdiction between the need to permit the government to experiment with programmes of development and socio-economic policy and a countervailing requirement that the court override government policy when it conflicts with its interpretation of fundamental human rights.

Emily Bazelon suggests that some of this tension may be traced to the background of Albie Sachs, the justice who helped draft the country's sweeping set of constitutional rights, including the right to adequate healthcare, which was at the heart of the AIDS case. A former freedom fighter with close ties to the African National Congress. During apartheid, Sachs was held in solitary confinement for half a year and lost his right arm in a car bombing by South African security forces. He embarked on a new career as a constitutional theorist and a jurist in 1990 after returning from 24 years of exile. On the bench, he was known as the *"gut-feeling justice,"* a label that' was both derisive and complimentary. She posits that the court continues to have a heady mandate: to remake the nation's law based on the new constitution. The justices who write the leading opinions think the best way to establish their legitimacy is through cautious, step-by-step legal reasoning. But she also claims that the court is also influenced by justices whose life experiences bestow on them a high degree of moral authority.

As a panacea to the entrenchment of the legitimacy of rule of law Albie Sachs has argued for a strong bill of rights. It is suggested that he took that position for diplomatic reasons—*"what kind of freedom struggle takes up an anti-bill of rights position?"* he asked—and because he did not think change should happen at the whim of whoever was in power. But he also believed a constitution that protected the white-friendly status quo would fail. In an influential paper delivered in 1988 at an ANC seminar in Zambia, Sachs said that the

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Also *Cf.* the recent court decision on gay rights: '*The ruling follows a series of court battles on gay rights after the new constitution outlawed discrimination on the basis of sexual orientation. In 1998 the Constitutional Court struck down the offence of sodomy in the Sexual Offences Act and the Criminal Procedure Act. It is difficult to interpret this as restraining, when it expanded rights against the advice of the Home Affairs Department.*
The following year, the court allowed foreign partners of homosexual citizens to become permanent residents. In 2002, the Constitutional Court ruled that homosexual partners in a committed relationship should have the same financial status as married heterosexual couples.
……..In 2003, the court ruled that children born to same-sex couples by artificial insemination were legitimate.
The latest decision, …….*Judge Albie Sachs, in a majority judgment, says there is an imperative constitutional need to acknowledge the long history in SA of the marginalisation and persecution of gays and lesbians.*
Sachs said that the intangible damage to same-sex couples is as severe as the material deprivation. He argued for the need of a comprehensive judicial regulation of same-sex couples' separation or divorce, of devolution of property, rights which he see has no different from that of heterosexual couples.
Mabuza, Ernest (2005)., Business Day (South Africa), 12.02.2005 South Africa: *Gay marriages make the legal altar* available at [http://www.afrika.no/Detailed/10965.html] Also see Sachs, Albie (1990)., *Protecting Human Rights in a New South Africa.* Cape Town: Oxford University Press. p. 21 where he states: *'It also must be structured around a strategy of affirmative action…..and subject to review, in terms of the constitution, by the court's'* Again emphasising that the courts will play the role of affirmation not of restraint.
The point I am seeking to argue here is about Justice Albie Sachs, that he is situated within a dilemma of his own making of the kind described by Justice Robert Jackson as an inversion. See *A Sachs 'Book Review'* (2001) 86 Univ. Toronto LJ 87. Justice Jackson was famous for transforming direct statements into inversions. See *Brown v Allen* 344 US 443, 540 (1953) *('We are not final because we are infallible, but are infallible only because we are final')* and *American Communications Association v Dowds,* 339 US 382, 442-43 (1950) (*'It is not the function of our government to keep the citizen from falling into error; it is the function of the citizen to keep the government from falling into error'*).
Sachs' meditation on the judicial function expresses a tension at the heart of the judicial role in a newly democratic jurisdiction between the need to permit the government to experiment with programmes of development and socio- economic policy and a countervailing requirement that the court override government policy when it conflicts with its interpretation of fundamental rights.
There is the view that contrary to Albie Sachs' argument that court does not express power but restrains it, it is actually in the face of evidence of its activity in the realm of socio-economic rights, which has traditionally been viewed as posing the greatest danger to the democratic ideal of decision-making he and his fellow judges in the South African Constitutional Court have engaged in political and economic evaluations that are beyond their expertise and remit.
1 *Ibid.*
2 *Ibid.*

"objective of a Bill of Rights should be to reinforce rather than restrict democracy," and he pushed for the inclusion of rights like access to housing, water, healthcare, and a clean environment. Instead of following the U.S. Constitution, which protects citizens *from* government interference, a new South African constitution could also obligate the government *to* provide social benefits, and so combat economic inequity.[1]

We have already articulated the argument of the contrary view of Albie Sachs that court does not express power but restrains it. However, this paper presents the argument that in the face of evidence of its activism in the realm of socio-economic rights, which has traditionally been viewed as posing the greatest danger to the democratic ideal of decision-making he and his fellow judges in the South African Constitutional Court have engaged in political evaluations that are beyond their expertise and remit and hence lies the potential for danger. However, all these must be considered with the context of the South African TRC.

There is some attempt at engagement with this in the doctoral thesis titled *'Speaking Truth to Power: South Africa's Truth and Reconciliation Commission and the Work of Albie Sachs.'* The argument is articulated clearly that the application of the **Promotion of National unity and Reconciliation Act (No 34, 1995)** amnesty provisions to an *"act, omission or offence ... associated with a political objective committed in the course of the conflicts of the past."* to both sides—the liberation movements and the apartheid state—encapsulates both its compromise origins and its significance as a step towards the establishment of the rule of law.

Albie Sachs admits that depending on your definition of justice it may have been partially compromised but despite this he concludes essentially the Truth and Reconciliation Commission was committed to the development of a human rights culture and a respect for the rule of law in South Africa.[2] He is also convinced that South Africa secured justice in the sense that it achieved democratic government, constitutionalism and the rule of law.[3]

The attempt to ground the argument about the fundamental role the rule of law plays in the development of South Africa, latterly the Chief Justice of South Africa, The Hon. Mogoeng Mogoeng in a speech titled *'The Rule of Law in South Africa: Measuring Judicial Performance and Meeting Standards'* argues[4]:

> *The exercise of public power must ... comply with the constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the constitution. It entails that both the Legislature and the Executive "are constrained by the principle that they may exercise no power and perform no function beyond that conferred on them by the law". In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.*

He adds: *In this regard, the United Nations observed a few years ago that there was a direct link between the capacity of the judiciary to promote the rule of law and facilitate good governance .....*

It is suggested that the Chief Justice's recent argument about the role of the judiciary shows clearly that the threat to the legitimacy of the rule of law in South Africa lies not within the courts but with the executive, those that exercise 'power'. This leads into engagement with the consequences of the TRC process for the legitimacy of law and ultimately South Africa's political system and how power may be deployed as a utility tool for reconciliation.

The arguments above does show that there is a degree of exposure of truth to the structures created by power but also an admission that the interplay within the two has not yet demonstrated any conclusive evidence that it has adversely affected the legitimacy of law in South Africa. Due to the entrenchment of the Truth and Reconciliation process in the South African constitution and the rendering the claims of victims non-justiciable it can be argued they acted according to the rule of law, that they have given the rule of law legitimacy. It could also be argued that because of the very limited nature of the derogation in the time of transition and on the back of an overwhelming electoral mandate the fear of impunity and illegitimacy is unlikely to afflict South Africa. Furthermore because of the unique safeguards included in the constitution the legitimacy of the rule of law will be preserved. These enables South Africans to sue individually to enforce the new socioeconomic rights going

1 Bazelon, Emily (2003): *After The Revolution* downloaded from http:??legalaffairs.org/issues/January-February-2003/feature_bazelon_janfeb2003.msp.

2 Ojedokun, Olu (2006*)., Speaking Truth to Power: South Africa's Truth and Reconciliation Commission and the work of Albie Sachs.* Unpublished Ph.D. thesis.

3 *Cf.* Sachs, Albie (1991)., *From the Violable to the Inviolable: A Soft-Nosed Reply to Hard-Nosed Criticism* .7 South Africa Journal of H rights 98(1991): Again the question I ask is whether is this not an expression of power, which Albie Sachs appeared to deny earlier in this thesis, when he said: "*Yet our court does not express power, it restrains power. Our job is to defend the new Constitution, to ensure that all the agencies of society, all public institutions, function in terms of the processes laid down by our Constitution and respect the values enshrined in it."*

4 Mogoeng, M (2013)., *The Rule of Law in South Africa: Measuring Judicial Performance and Meeting Standards* downloaded from http://constitutionallyspeaking.co.za/transcript-chief-justice-mogoeng-on-the-rule-of-lawin-south-africa/

further than the constitutions of countries like Canada, India, and Ireland, where socio-economic rights are included, but only as goals. And it exposed the government to demands for access to healthcare, housing, and water that could be impossible to meet. So the constitution included an escape clause: The state would be required to take only *"reasonable legislative and other measures, within its available resources, to achieve the progressive realization"* of these rights. The idea was to give the government incentive to try while acknowledging the practical difficulties of doing so.

The paper ends with the suggestion that the truth and reconciliation process is capable of enhancing the legitimacy of the rule of law, provided unique safe guards are included in the governing constitution and applied duri ng a transitionary phrase.

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