Albie Sachs and the politics of interpretation

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1 Introduction

The politics of interpretation continues to haunt judges and legal theorists. Ever since the legal realists launched their attack on the formalist belief that general legal rules can generate determinate answers to concrete legal questions, constitutional thought has been obsessed with the spectre of unelected judges thwarting the will of legislative majorities in the name of their own, subjective interpretations of constitutional provisions.[1] For generations of constitutional scholars, attempting to show how judges can avoid substituting their own views on policy issues for those of legislatures, and/or how constitutional adjudication can be placed on a more secure footing has been a consuming passion.[2] The

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[1]Paul W Kahn writes that, in the first half of the 20th century in the United States, a radical shift occurred in constitutional theory as a result of the emergence of the new social sciences and the demise of the *Lochner* Court. Constitutional theory no longer centred on the justification of majoritarian institutions, but came to focus on the opposite problem: 'the institutional contrast between an illegitimate Court and the democratically legitimated political branches'. Kahn *Legitimacy and history: Self-government in American constitutional theory* (1992) 135. In Germany, too, the institution of judicial review came under fire. Judgments that were seen to be inspired by a reactionary, anti-redistributionist politics drew attention to the anti-democratic nature of judicial review, and the rule of law came under pressure as a result of increasing reliance on open-ended, moralistic legal standards and recourse to administrative rulings and decrees. See Lübbe-Wolff 'Safeguards of civil and constitutional rights: The debate on the role of the *Reichsgericht'* in Wellenreuther (ed) *German and American constitutional thought* (1990) 353. See also generally Botha 'Democracy and rights: Constitutional interpretation in a postrealist world' (2000) 63 *THRHR* 561 and the literature referred to therein.

[2]The first strategy extols the virtues of a passive judiciary that refrains from substituting its views on policy issues for those of the legislature, and exercises its power of review only in cases where government action poses a real threat to the constitutional system of government. Classic examples include Hand *The Bill of Rights* (1958); and Bickel *The least dangerous branch* (1962). The second strategy seeks to ground constitutional interpretation in some objective source of constitutional meaning, such as the constitutional text, structure, history or purpose, and thus attempts to show that the making of constitutional value choices is not tantamount to an expression of the judge's subjective ideology or preference.

attempted mediations of what has been dubbed the 'counter-majoritarian dilemma' are legion and rest upon widely divergent views of legal reasoning and of the judicial role. These differences notwithstanding, there are, however, certain shared assumptions held in common by the proponents of a great variety of approaches to and theories of constitutional interpretation. Firstly, it is assumed that the politics of interpretation consists of the danger that judicial decision making may be insufficiently constrained; that in the absence of a reliable interpretive approach or method which meaningfully circumscribes the discretion of judges, adjudication will invariably rest on judicial whim and prejudice. Secondly, it is believed that there must be a way out of the conundrum, that it is possible to neutralise the politics of law if the correct interpretive method – or the most judicious set of adjudicative practices – is followed.

These views on the politics of interpretation have ceased to command universal assent. Today, it is widely recognised that a judge's understanding of factual and legal disputes is invariably shaped by her experience and background. The belief in the availability of a single interpretive theory or method which would allow judges to steer clear of controversial value choices has also been dented – increasingly, different interpretive methods are seen, in the words of Michelman, as 'multiple poles in a complex field of forces, among which judges navigate and negotiate'.[3] However, recognition of the influence of a judge's personal experience, attitudes and beliefs and of her creative role in interpreting, reinterpreting and applying legal materials is not tantamount to an acknowledgment that adjudication is simply instrumentalist politics covered up by the supposedly neutral language of law.[4] Judges, it is recognised, are constrained by virtue of their socialisation in a particular legal culture, their membership of an interpretive community (or communities) and the obligation to provide reasoned justifications for judgments. The one-dimensional view which sees freedom and constraint in constitutional adjudication in all-or-nothing terms has started to make way for a more nuanced picture which reveals different shades and textures of constitutional meaning, and recognises the role of context, imagination and justification in legal reasoning.[5] This opens up the possibility of an alternative conception of the politics of law, which would avoid the dichotomised worldview and the quest

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[3]Michelman 'A constitutional conversation with Professor Frank Michelman' (1995) 11 *SAJHR* 477 at 483. The same metaphor is employed by Häberle 'Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat' 1989 *Juristen Zeitung* 913 at 917.

[4]In *President of the Republic of South Africa v South African Rugby Football Union* 1999 4 SA 147 (CC); 1999 7 BCLR 725 (CC) an application was brought for the recusal of five of the Constitutional Court's judges. The Court rejected the allegation of a reasonable apprehension of bias on the part of the judges that was based, in part, on the contention that they were political appointments with close ties to the ANC prior to their appointment. While acknowledging the role of personal experience and individual outlooks in shaping judicial responses to legal questions (paras 42-44), the Court did not view the judges' political beliefs and prior experience as a barrier to their ability to decide cases without fear, favour or prejudice.

[5]Botha 'Freedom and constraint in constitutional adjudication' (2004) 20 *SAJHR* 249.

for normative closure inherent in attempts to insulate legal interpretation from the corrosive effects of politics.

This article focuses on the contribution of Albie Sachs to the development of such an alternative understanding of the politics of legal interpretation. Sachs J's constitutional jurisprudence subverts and inverts traditional understandings of the politics of law. For Sachs J, the idea that judges are able to bracket away their individual experience, political beliefs, cultural assumptions and social expectations when performing their adjudicative functions is simply inconceivable. To this extent, the politics of law is intractable. To deny the politics of interpretation is not only to deceive ourselves, but also to strengthen its hold on us. Unacknowledged, it can continue unhindered to colour our judgment, to dress contingent beliefs in the garb of necessity, and to blind us to alternative futures.

By far the better course, in the view of Sachs J, is to openly acknowledge law's political nature, and as far as possible, to be conscious of and to reflect critically on the hidden assumptions and inarticulate premises shaping our interpretations. Only thus can we hope to challenge the hegemonic force of received wisdom and find traces of more humane futures scattered among the reified understandings embedded in our tradition.

The point is not that these views are unique to Sachs J's jurisprudence, nor that he was the first to articulate this understanding of the politics of interpretation. Other constitutionalists have expressed similar views, and may have done so in a way that is more systematic and theoretically better founded.[6] The point is, rather, Sachs J's exceptionally intuitive grasp of these points and his ability, within the context of concrete disputes, to resist the pull of assumptions that are so deeply embedded in our legal categories and cultural understandings that they seldom rise to the level of conscious deliberation and critical reflection.

The article first considers Sachs J's resistance to the tendency of concepts, categories and oppositions that are deeply embedded in legal thought to privilege the status quo and to inhibit our constitutional imagination. It then turns to a consideration of some of the ways in which Sachs J reinterprets the legal past and uses strategies of memorialisation to challenge the tendency to inscribe constitutionalism in a restrictive, nationalistic historical narrative. Finally, it concludes with tentative observations on the limits of our capacity to resist the politics of interpretation.

2 Resisting the politics of interpretation

2.1 Albie's world

Albie, the protagonist of the ABC cartoon series *Albie's world* is a six-year old boy whose dealings with shrewd penguins, hippos in the paddling pool, moose hiding

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[6]Karl Klare's analysis of the divide between the Constitution's transformative aspirations and the conservatism of South African legal culture remains a landmark. See Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146.

in the wood shed, zebras sleeping in the kitchen cupboards and gnus in the toilet dancing the tango makes for intriguing television. The funny thing is that no one else notices these creatures, so that the chaos unleashed by them is blamed, inevitably, on poor Albie. And yet the agony never lasts too long, as Albie's explosive imagination once again quickly turns the banality of the everyday into something extraordinary

I must confess that I was reminded once or twice, while watching the programme with my children, of that other Albie, whose contribution as Constitutional Court judge is celebrated and interrogated on the pages of this journal. Like his namesake, Judge Albie Sachs has a knack for seeing things differently – for spotting connection where others see divergence, for recognising difference where others see more of the same, for glimpsing vistas of opportunity where more conventional jurists perceive only the hard lines of legal constraint. In his world, unequal power relations become visible at precisely the point that many others see manifestations of individual autonomy. Colourful parades of different religions, worldviews and family formations are common, as are scenes of Rastafarians and state officials dancing the tango. Yet unlike his fictional counterpart, this Albie is seldom if ever unable to explain his somewhat unconventional views of law and life. His judgments reveal a strong belief in the capacity of (legal) language to enable and structure alternative ways of seeing and thinking about our social world, and of bringing others around, if not to seeing things the way we do, then at least to realising that their own way of thinking about legal and social issues is not the only plausible one.

Sachs J's critical jurisprudence is enabled, in part, by his somewhat unconventional take on a series of oppositions that are constitutive of legal thought. The distinctions between rules and standards, text and context, domestic and foreign law, law and politics, public and private law, and objective knowledge and subjective experience are organising principles of legal thought which guide our deliberations about law even if we are aware that these oppositions are highly unstable and may constrain our ability to respond to social injustice. We are unlikely to break the hold of these binaries and hierarchies by storming the citadels of legal reasoning, as they have the tendency to avenge themselves even when overturned. Ever the gentle terrorist, Sachs J's genius lies not in the deadly force he unleashes on the enemy, but in the subtle ways in which he destabilises these oppositions.

In this section, I examine some of the strategies used by Sachs J to resist the politics of interpretation, and to allow us to look differently. These include: resisting the privileging of rules over standards and of text over context; emphasising social, historical and cultural contexts that are routinely ignored; and placing dialogue and voice at the centre of his jurisprudence. Common to these strategies is a resistance to hierarchical oppositions and a determination to confront the supposedly cold, disembodied logic of the law with the hopes, fears and struggles of ordinary men and women.

2.2 Interrogating concepts and categories

That the traditional understanding of the politics of interpretation still exerts a powerful hold on the South African legal imagination is clear, inter alia, from the tendency to privilege legal rules over flexible legal standards. Broad, flexible standards are seen as too abstract and 'free floating' to constrain judicial discretion in a meaningful manner. While the importance of standards like good faith, public policy and *boni mores* in the development of the law is readily acknowledged, these concepts tend to be relegated to the status of background considerations. To elevate them to the same status as legal rules would, it is feared, allow judges to undermine legal certainty and stability by giving free rein to their own moral and political views.[7]

For Sachs J, the perceived safety and stability of rules is a reason for caution, rather than celebration. Ever sceptical about the idea that judges can escape the complexity and messiness of social life through the mechanical application of legal rules and categories, he prefers to put his trust in practical reasoning and careful, contextualised judgment. The point, for him, is not that the hierarchy of rules and standards should simply be inverted – such a position would rest on a far too uncritical acceptance of the dichotomy between rules and standards and would be lacking in nuance. The point is, rather, to be alive to the ways in which entrenched categories and binary oppositions tend to structure our thinking and condition our reflexes. Flexible standards may, generally, lend themselves better to a critical, context-sensitive jurisprudence, but can also become subject to unthinking, mechanical application.[8] Legal standards and categories which once liberated interpreters from the straightjacket of over-simplistic and obsolete dogma tend, over time, to become reified. Having lost their original vitality and flexibility, they come to inhibit the legal imagination and constrain law's capacity to adapt to new challenges.

In Sachs J's view, the remedy is for interpreters to stop thinking of legal concepts as if they are self-contained and somehow removed from the social and historical processes through which they were moulded. By locating legal rules and standards in 'the context of a lived and experienced historical, sociological and imaginative reality'[9] they may become able yet again to use them reflectively. Conscious of the times and social milieu in which they took root and the values

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[7]See eg, *Afrox Healthcare Bpk v Strydom*, 2002 6 SA 21 (SCA) para 32. See Botha (n 5) 267-275 for a critique of the dichotomy between rules and standards, and the privileging of rules over standards.
[8]In *Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison* 1995 10 BCLR 1382 (CC) para 46 Sachs J warned, somewhat controversially, against the tendency to 'argue the two stages of fundamental-rights litigation in a mechanical and sequentially divided way without paying sufficient attention to the commonalities that run through the two stages' (para 46). In *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC); 2002 3 BCLR 231 (CC) para 151 he disavowed any pretence to 'scientific' balancing, and pointed out that the weighing of conflicting interests under section 36 'does not take place on weightless scales of pure logic pivoted on a friction-free fulcrum of abstract rationality'.
[9]*Prince* (n 8) para 151.

which they were designed to serve, and alert to the slippages and discontinuities which may have occurred in their application to a changing social reality, interpreters are likely to become more conscious of the way in which their responses to legal issues are conditioned by deeply ingrained assumptions and reflexes.

Examples abound of Sachs J's distaste for forms of legal argumentation which have a mechanical and unreflective quality and of his interrogation of concepts and categories in view of a dynamic historical and social context. In his dissent in *Barkhuizen v Napier*,[10] he notes how 'sanctity of contract and the maxim *pacta sunt servanda* have through judicial and text-book repetition come to appear axiomatic, indeed mesmeric, to many in the legal world'.[11] He then proceeds to show how strangely out of place uncritical reliance on these principles is in the context of standard form contracts, which are designed not to maximise consensus between the parties but to serve the organisational needs of the party which is already in a far more powerful position. In Sachs J's own words, 'to treat mass-produced script as sanctified legal Scripture is to perpetuate something hollow and to dishonour the moral and philosophical foundations of contract law'.[12]

A second example is equally instructive. *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*[13] concerned the government's attempts to evict residents of an informal settlement in order to enable the upgrading and building of formal housing. The case sparked a lively judicial debate about the lawfulness of the appellants' occupation of state-owned land. Arguing against Yacoob J's finding that their occupation was never lawful, Sachs J wrote:

> In my opinion, the question of the lawfulness of the occupation ... must be located not in the framework of the common law rights of landowners, but in the context of the special cluster of legal relationships between the council and the occupants established by the Constitution and the Housing Act ... The very manner in which these relationships are established and extinguished will be different from the manner in which these relationships might be created by the common law, for example, through contract, succession or prescription. They flow instead from an articulation of public responsibilities in relation to the achievement of guaranteed social and economic rights. Furthermore, unlike legal relationships between owners and occupiers established by the common law, the relationships between a local authority and homeless people on its land will have multiple dimensions, involve clusters of reciprocal rights and duties and possess an ongoing, organic and dynamic character that evolves over time.[14]

Resisting the framing of the legal question in terms of a static, private law conception of ownership which had developed in a very different context, Sachs J found that the government had, in view of its constitutional and statutory obligations to the homeless, consented to the occupation. Its consent was, however, not

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[10]2007 5 SA 323 (CC); 2007 7 BCLR 691 (CC).
[11]Paragraph 141.
[12]Paragraph 156.
[13]2009 9 BCLR 847 (CC).
[14]Paragraph 343.

unconditional, and the occupation subsequently became unlawful when the municipal council withdrew its consent in order to implement an ambitious housing programme. In the view of the judge, this framing of the problem strikes a better balance between the inherent human dignity and worth of the occupants[15] and recognition of the government's power – and obligation – to devise and implement reasonable measures to achieve progressive realisation of the right to housing. Its use of traditional legal concepts and oppositions – such as that between lawful and unlawful – is far more flexible and attuned to the complexity of the relationship between the state and those who have settled on state land.[16]

2.3 Text and context

In *Volks NO v Robinson*,[17] the majority held that the exclusion of the survivor in a permanent life partnership from benefits under the Maintenance of Surviving Spouses Act 27 of 1990 did not constitute unfair discrimination on the ground of marital status. The judgments of Skweyiya J and Ngcobo J, both of which were endorsed by a majority of judges, invoke a series of standard dichotomies and hierarchies. These include: the privileging of marriage over permanent life partnerships;[18] the distinction between constraints placed on the making of basic life choices and the regulation of the consequences following from such choices;[19] the privileging of the parties' freely chosen responsibilities over obligations imposed by law;[20] and the separation of powers between the legislature and judiciary.[21] Sachs J's dissent is a masterpiece in the destabilisation of commonly held assumptions about law. From the outset he contests the framework within which the majority situated its analysis. Rejecting the majority's foregrounding of black letter law and consequent neglect of the social, historical and cultural contexts, he takes great care to articulate the various contexts within which the matter is most appropriately considered. He points, for instance, to the deeply entrenched, all pervasive nature of sexism and patriarchy, the intersections between race, gender and poverty, the limitations of a definitional, as opposed to a functional, approach to family rights and responsibilities, the role of the Act in

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[15]Sachs J writes that, through recognition of their right to occupy, the individuals and communities in question 'escaped the status of pariahs who had been historically converted by colonial domination and racist laws into eternal wanderers in the land of their birth' (para 354).

[16]For instance, while conceding Yacoob J's point that 'occupation cannot be both lawful and unlawful at the same time', Sachs J writes that he can 'see no reason why occupation that is lawful at one moment cannot at a later stage become unlawful' (para 360).

[17]2005 5 BCLR 446 (CC).

[18]For example, the importance attached to the fact that in a marriage the rights of spouses are determined primarily by law and not by agreement. See paras 55-58; 87 (since marriage is 'a constitutionally recognised institution', there are circumstances in which 'the law may afford protection to married people which it does not accord to unmarried people'.

[19]Paragraphs 90, 91.

[20]*Id* paras 93-94.

[21]*Id* paras 66-67.

responding to economic need, and the constitutional imperative to transform family law in accordance with the constitutional values of human dignity, equality, diversity and tolerance of difference.

For some, Sachs J's framing of the inquiry may signal a preference for 'free-floating' modes of interpretation over fidelity to the legal text, or a victory of politics over law. He has, however, an answer ready. In this area, our reading of the text is invariably:

> embedded in an elusive, evolving and resilient matrix made up of varied historical, social, moral and cultural ingredients. At times these emerge and enter explicitly into the legal discourse. More often they exercise a subterranean influence, all the more powerful for being submerged in deep and largely unarticulated philosophical positions.[22]

The politics of law, he suggests, is most pernicious when dressed in the garb of 'commonsense' assumptions that are ostensibly neutral and unobjectionable. Better, then, to recognise that the legal framing of complex social issues is seldom if ever neutral, to be self-conscious about the way in which we arrange, re-arrange, highlight and de-emphasise the various social, cultural and historical features of the landscape, and to be candid about the moral and political beliefs shaping our judgments.

Once he has adjusted the relevant legal landscape, Sachs J is able to destabilise the oppositions in terms of which the majority's reasoning is structured. Far from denying the importance of the institution of marriage, he highlights the special role of marriage in overcoming the legacy of apartheid, which severely disrupted family life and 'showed profound disrespect for the marriages of the majority'.[23] However, the issue 'is not whether marriage should in many respects be privileged. Clearly it has to be. The question is whether it must be exclusive.'[24] He then proceeds to show how the exclusivity of marriage in this context deprives surviving partners in a permanent partnership from much needed material support in a way which impairs their dignity, perpetuates harmful stereotypes, is rooted in a conservative, Calvinist morality, reinforces the sexual division of labour, and is blind to unequal power relations between men and women. And although he recognises the role of marriage in promoting responsibility and self-reliance, he is quick to dissociate these ideas from metaphysical notions of free choice. Insisting that the significance of choice cannot be divorced from the social context,[25] he notes that:

> the law cannot ignore the fact that lack of resources has left many women with harsh options only. Their choice has been between destitution, prostitution and loneliness, on the one hand, and continuing cohabitation with a person who was unwilling or unable to marry them on the other. Any consideration of the fairness

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[22] *Id* para 149.
[23] *Id* para 206.
[24] *Id* para 208.
[25] See paras 154-162.

> or otherwise of excluding from maintenance claims people who chose the latter path, must take account of this.[26]

For Sachs J, it makes little sense to ground the autonomy of vulnerable life partners in abstract notions of choice which ignore the constraints placed upon them by laws which reinforce their material disadvantage and perpetuate patterns of social exclusion and cultural prejudice. Speaking of their autonomy only makes sense within the context of their lived experience, which testifies in equal measure to their creativity and resilience, on the one hand, and desperation and need, on the other. Absolving the law from responsibility for their plight would amount to a judicial abdication, despite the fact that there are limits to what a court order can, under the circumstances, attain.

2.4 Voice and dialogue

Given the centrality of context to Sachs J's jurisprudence and his reliance on a lived historical and sociological reality to cut through the undergrowth of reified understandings and axiomatic truths and to interrogate and reinterpret the normative meaning of legal concepts and categories, it is only to be expected that he should assign special significance to the participation and voice of those whose lives are intimately affected by the operation of legal rules. His jurisprudence of voice and dialogue is underpinned, first, by a substantive vision of social citizenship which values civic and political participation both as an expression of human dignity and autonomy, and for its contribution to more deeply deliberative and democratic decision making. On this view, respect for the inherent dignity and worth of the human person requires individuals to be treated as autonomous persons rather than as mere objects of legal or administrative procedures. Measures which deny the equal moral citizenship or unduly inhibit the participation of vulnerable groups in public life are subjected to close scrutiny,[27] as are formal restrictions on citizenship and the right to vote.[28] Moreover, those affected by laws and government conduct are entitled to consultative and participatory processes in which they are given the opportunity to voice their concerns and to participate in the search for a mutual accommodation of conflicting rights and interests. Sachs J's judgments in cases dealing with issues as diverse as voting rights, the legislative process,[29] evictions,[30]

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[26]Paragraph 225.

[27]See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC); 1998 12 BCLR 1517 (CC) para 127; *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC); 2006 3 BCLR 355 (CC) para 71.

[28]*August v Electoral Commission* 1999 3 SA 1 (CC); 1999 4 BCLR 363 (CC) para 17 ('the universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts').

[29]*Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC); 2006 12 BCLR 1399 (CC) para 234 ('Minority groups should feel that even if their concerns are not strongly represented, they continue to be part of the body politic with the full civic dignity that goes with citizenship in a constitutional democracy. Public involvement will also be of particular significance for members of groups that have been the victims of processes of historical silencing. It is

equality and religious freedom[31] testify to his concern with citizenship and democratic participation as an expression of the equal dignity of all members of society.

At the same time, these and other judgments are premised on the vision of an open, inclusive and pluralistic democracy in which the quality of democratic deliberation is enhanced by allowing the widest possible range of voices to be heard.[32] Democracy, in this view, is strengthened by the capacity of marginalised and vulnerable groups to challenge dominant norms and assumptions.[33] (That associations and institutions designed to promote the cultural and religious life of minorities are themselves not free from the demand for internal dialogue is evident from cases in which the Court regretted the parties' failure to give an opportunity to children that were directly affected by the cultural and religious practices in question to participate in the judicial proceedings.[34]) Secondly, it is felt that democracy is served by the capacity of public participation to destabilise bureaucratic processes, as they are opened up to needs and viewpoints that are routinely excluded from consideration.[35]

Secondly, Sachs J's jurisprudence of voice and dialogue has been shaped by his understanding of the judicial role in a pluralistic society that is trying to come to terms with a divided and unjust past. In such a society, courts are likely to be confronted with intractable value conflicts in which both sides have

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constitutive of their dignity as citizens today that they not only have a chance to speak, but also enjoy the assurance they will be listened to'). See also *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 5 SA 171 (CC); 2008 10 BCLR 968 (CC) para 292.

[30] *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); 2004 12 BCLR 1268 (CC) para 41 ('those seeking evictions should be encouraged not to rely on concepts of faceless and anonymous squatters automatically to be expelled as obnoxious social nuisances. Such a stereotypical approach has no place in the society envisaged by the Constitution; justice and equity require that everyone is to be treated as an individual bearer of rights entitled to respect for his or her dignity').

[31] *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC); 2000 10 BCLR 1051 (CC) para 36 (emphasising the link between freedom of religion and human dignity and personhood); *S v Lawrence; S v Negal; S v Solberg* 1997 4 SA 1176 (CC); 1997 10 BCLR 1348 (CC) (articulating freedom of religion with citizenship and political equality).

[32] *Democratic Alliance v Masondo* 2003 2 SA 413 (CC); 2003 2 BCLR 128 (CC) paras 42 (the Constitution 'contemplates a pluralistic democracy where continuous respect is given to the rights of all to be heard and have their views considered') and 43 ('The open and deliberative nature of the process goes further than providing a dignified and meaningful role for all participants. It is calculated to produce better outcomes through subjecting laws and government action to the test of critical debate').

[33] See the analysis of Sachs J's dissent in *Prince* (n 8) in Woolman and Botha 'Limitations: Shared constitutional interpretation, an appropriate normative framework and hard choices' in Woolman and Bishop (eds) *Constitutional conversations* (2008) 149 at 179-182.

[34] *Christian Education* (n 31) para 53; *MEC for Education: KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC); 2008 2 BCLR 99 (CC) paras 55-57, 177.

[35] Judgments in which structural interdicts are granted and engagements orders are made can be argued to conform to Roberto Unger's definition of 'destabilisation rights' as 'protect[ing] the citizen's interest in breaking open the large-scale organisations or the extended areas of social practice that remain closed to the destabilising effects of ordinary conflict and thereby sustain insulated hierarchies of power and advantage' (Unger *False necessity: Anti-necessitarian social theory in the service of radical democracy* (1987) 530, as cited by Sabel and Simon 'Destabilization rights: How public law litigation succeeds' (2004) 117 *Harvard LR* 1015 at 1055).

legitimate claims grounded in the Constitution.[36] In these cases, courts are often ill equipped to make a final determination. As Sachs J put it in the *Joe Slovo* case:

> The fact is that in a constitutionally-based, pluralistic society such as ours, the court's function will often move from simply determining the frontiers between 'right' and 'wrong', to holding the ring between 'right' and 'right'. In many circumstances, instead of seeking to find a totally 'right' or 'correct' solution, the judiciary will be obliged to accept the intellectually more modest role of managing tensions between competing legitimate claims, in as balanced, fair and principled a manner as possible.[37]

In his view, in the absence of a single correct answer to complex legal issues, the best a court can do will often be to facilitate and steer dialogic interaction between the parties. This it can do through a variety of mechanisms. It can attempt to harmonise conflicting rights and interests through a species of proportionality analysis which aims at the mutual accommodation of conflicting viewpoints.[38] Or it can make adverse findings against a state agency that has failed to engage those affected by a decision,[39] or require the parties meaningfully to engage and to report back to the court. If satisfied, the court will then incorporate their agreement into its order.[40] Whatever the mechanism used, the rationale appears to be the same: to keep conflicting constitutional visions and interests in play by making context-specific determinations which respect the right of the parties to decide, on a dialogic and experimental basis and subject to the broad guidelines issued by the court, on the best way of accommodating a diversity of interests.

This involves a proceduralisation of constitutional issues, as courts focus increasingly on the nature and inclusiveness of participatory processes and the question whether the interests of vulnerable groups and individuals have been adequately considered. Sachs J would, however, insist that such a procedural focus is anchored in substantive values and that courts, in holding 'the ring between "right" and right"', perform a vital function in ensuring that the open and democratic society envisaged by the Constitution is not hijacked by particular interests or undermined by bureaucratic intransigence. The point, he might argue, is not for judges to evade responsibility for their decisions by passing the buck to the parties to the dispute, but rather to interrupt and interrogate bureaucratic and judicial mindsets through face-to-face interaction and bona fide dialogue with those whose concrete needs would otherwise be reduced to abstract considerations in an impersonal calculus.

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[36]'[T]here are some problems based on contradictory values that are so intrinsic to the way our society functions that neither legislation nor the courts can "solve" them with "correct" answers'. *Port Elizabeth Municipality* (n 30) para 38.

[37]*Residents of Joe Slovo Community* (n 13) para 333.

[38]See *Prince* (n 8) paras 146-149, 155-156, 162, 170; *Pillay* (n 34) paras 71-83, 174, 177, 182.

[39]In *Port Elizabeth Municipality* (n 30) the Court, while stopping short of requiring mediation, regarded the state's failure to try mediation as an important consideration in finding that an eviction order would not be just and equitable. See paras 39-47, 59, 61.

[40]*Occupiers of 51 Olivia Road, Berea Township v City of Johannesburg* 2008 5 BCLR 475 (CC); *Residents of Joe Slovo Community* (n 13).

3 Re-imagining the past

3.1 Sachs in Arabic

Exhausted by a demanding conference programme, overwhelmed by the hospitality of our hosts at the University of Belgrade and slightly inebriated we were cruising down the Sava river, eating, drinking, talking, laughing and taking in the historic scenery. Speeches were made in English, French and Serbian. Abdullah an-Na'im rose, on the spur of the moment, to address us. He spoke briefly but beautifully in Arabic. The meaning of his words was lost on me (as, I suspect, on my fellow travellers), but he did give us the benefit of an English translation. He explained that he had quoted Albie Sachs, and that for him Sachs's words on sameness and difference captured his experience during the conference. As a member of a diverse panel of international participants in a conference celebrating sixty years of the Universal Declaration of Human Rights,[41] hosted in a country which had experienced such horrific trauma in the recent past, he could not help but marvel at the paradox that it is our differences that unite us and our sameness that sets us apart.

Whether it was the wine, the company, or Abdullah's gift for oratory and his impeccable timing, at that moment I thought I saw, reflected in the river of history that we were gliding along, a clear picture of a shared humanity united by our differences. And I felt secure in the knowledge that we are bound to avoid past mistakes, as long as we remember the horrors of the past and remain alert to the ceaseless interplay of equality and difference.

3.2 Construing past disadvantage

Sachs J's critical jurisprudence relies on our ability to destabilise existing hierarchies and symbolic oppositions, to vest reified concepts and categories with new meaning by engaging with the relevant social and historical contexts, and to highlight perspectives that were historically excluded from consideration. Its optimism about our ability to revisit and learn from the past is one of its most striking features. For Sachs, the Constitution is living proof that we are not doomed to be prisoners of history, but can reshape our destiny though critical engagement with the past. In his view the 'never again' sounded by the Constitution[42] is not a one-off call capable of formulaic application, but something that acquires meaning through constant and imaginative reinterpretation.

Not content with the much simplified version of the ills of our colonial and apartheid past which often stands in for 'history', Sachs J is determined to situate his analyses of laws and social practices within a historical framework that is alive to the multiple and overlapping forms of disadvantage which characterised our past and

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[41]The conference papers have been published in Jovanović and Krstić (eds) *Human rights today – 60 years of the Universal Declaration* (2010).

[42]See *Ferreira v Levin NO and Vryenhoek v Powell NO* 1996 1 SA 984 (CC); 1996 1 BCLR 1 (CC) para 257 n 22.

continue to inhibit the life chances of vulnerable groups and categories of people. Most telling in this regard is a series of dissenting and concurring judgments which show far greater sensitivity than the majority to the ways in which ostensibly neutral laws reinforce historical patterns of disadvantage and misrecognition.

Consider, for example, his dissenting judgments in a number of cases in which discrimination was alleged on the grounds of sex, gender and/or marital status.[43] In *Harksen v Lane NO*,[44] the constitutionality of section 21 of the Insolvency Act was in issue. This section provides that, upon sequestration of the estate of an insolvent spouse, the property of the solvent spouse vests in the Master of the Supreme Court or the trustee of the insolvent estate. The majority conceded that section 21 discriminates against the solvent spouse, but held that such discrimination was not unfair. Their finding that solvent spouses are not a category historically discriminated against is not backed up by any argument,[45] and their conclusion that section 21 does not demean the human dignity of the solvent spouse shows little sensitivity to the historical record.[46] In a dissenting judgment consisting of less than three pages, Sachs J masterfully exposes the patriarchal origins of section 21. He shows that the section is rooted in and reinforces 'a stereotypical view of the marriage relationship' which assumes that 'one business mind is at work within the marriage, not two'.[47] This stereotype is demeaning to spouses and is inconsistent with their dignity and autonomy. The following passage succinctly captures his willingness to look beyond grand narratives in search of historical deprivations and imbalances of power which continue to impede equal participation in public life:

> [A]n oppressive hegemony associated with the grounds [of discrimination] contemplated by section 8(2) may be constructed not only, or even mainly, by the grand exercise of naked power. It can also be established by the accumulation of a multiplicity of detailed, but interconnected, impositions, each of which, decontextualised and on its own, might be so minor as to risk escaping immediate attention, especially by those not disadvantaged by them.[48]

The judgment of O'Regan and Sachs JJ in *Jordan v S*[49] similarly reveals sensitivity to power relations that are so deeply embedded in our social structure that they often appear to be the product of individual choice or the neutral working of the market. Unlike the majority, who found that a statute criminalising the conduct of the prostitute but not that of the client was gender neutral and that the stigma suffered by prostitutes was the result of their own choice, O'Regan and Sachs JJ situated their analysis within the context of gender inequality, the feminisation of poverty, the dire financial need of many of those who turn to

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[43] See also the discussion of his dissent in *Volks NO v Robinson* in 2.3 above.
[44] 1998 1 SA 300 (CC); 1997 11 BCLR 1489 (CC).
[45] Paragraph 63.
[46] *Id* paras 65-67.
[47] *Id* para 120.
[48] *Id* para 123.
[49] 2002 6 SA 642; 2002 11 BCLR 1117 (CC).

prostitution, and sexual stereotypes and double standards. Conscious of the ways in which apparently neutral laws intersect with material deprivation and cultural prejudice to perpetuate historical patterns of inequality, they found that the statute constituted unfair discrimination.

Something similar is at work in some of Sachs J's judgments in the field of freedom of religion. In *S v Lawrence*[50] the constitutionality of a law prohibiting the sale of liquor on Sundays and religiously based holidays was in issue. Chaskalson P found that the law did not infringe religious freedom, as it did not 'force people to act or refrain from acting in a manner contrary to their religious beliefs'.[51] Sachs J chose to frame the matter differently. Relying on a judgment of O'Connor J of the United States Supreme Court in which she pointed out that the state is not allowed to send out the message that adherents of minority religions are 'not full members of the political community',[52] he showed how, prior to 1994, the state not only sought to enforce a Christian morality but also relegated other religious communities to the margins of society.[53] Despite finding that the limitation was justified, his reinterpretation of freedom of religion in view of the historical context provides an important corrective to Chaskalson P's overly restrictive view of the right and enables greater sensitivity to the symbolic effect of ostensibly neutral measures.

In *Prince v President of the Law Society of the Cape of Good Hope*,[54] which concerned the legislature's failure to provide an exemption on religious grounds from a general ban on the use of cannabis, his disagreement with the majority related primarily to the context within which the dispute was to be located. In the view of the majority the law enforcement context was all important. The minority, by contrast, emphasised the outsider status of Rastafari, their lack of political bargaining power,[55] and the fact that a blanket ban entrenches the social stigma which attaches to them by treating them as criminals and drug addicts. As a result, they held the state to a higher standard of justification, and found that the purpose of the prohibition could be achieved by more narrowly tailored measures.

3.3 Memorial constitutionalism

Lourens du Plessis argues that those judicial decisions that not only respect and protect difference but also celebrate Otherness have a strong affinity with memorial constitutionalism.[56] He defines memorial constitutionalism both as 'a constitutionalism of memory, in a South Africa (still) coming to terms with its

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[50](N 31).
[51]Paragraph 92.
[52]*Lynch, Mayor of Pawtucket v Donnelly* 465 US 668, 687-688 (1984).
[53]Paragraphs 149-153.
[54](N 8).
[55]Paragraphs 157-161.
[56]'Affirmation and celebration of the "religious Other" in South Africa's constitutional jurisprudence on religious and related rights: Memorial constitutionalism in action?' (2008) 8 *African Human Rights LJ* 376. See also Le Roux and Van Marle (eds) *Law, memory and the legacy of apartheid* (2007).

notorious past', and 'a constitutionalism of promise moving along the way of (still) getting to grips with a fulfilled and transformed future'.[57] Unlike monumental constitutionalism, which celebrates historic feats and heroic achievements, memorial constitutionalism draws upon the ordinary and unspectacular to commemorate past injustices and to warn against their reoccurrence. It is this more restrained strategy of dealing with the past that has sounded the 'never again' that honours past victims of injustice and draws critical attention to the gap between an unequal and authoritarian past and the constitutional promise of a democracy based on human dignity, equality and freedom. Du Plessis claims:

> The Constitutional Court's equality jurisprudence in relation to issues of identity and difference has increasingly been interrogating, with transformative rigour, 'mainstream' preferences and prejudices regarding the organisation of social life, inspired by a desire to proceed beyond – and 'not again' to resurrect – all that used to contribute to and sustain marginalisation of the Other.[58]

Du Plessis would, I think, agree that Sachs J has made a fundamental contribution to the establishment of a 'memorial' jurisprudence which recognises and celebrates difference. Sachs J's judicial approach exemplifies memorial constitutionalism in a number of ways. His sensitivity to context and attentiveness to forms of disadvantage that are manifested not in 'grand exercises of power' but in the interconnections between seemingly minor impositions track memorial constitutionalism's concern with the unspectacular and the everyday, as does his attention to the intersections of ostensibly neutral laws, cultural prejudice and/or economic power. His awareness of the need to interrogate and transform reified social categories recalls memorialism's distrust of grand narratives which tend to privilege and freeze certain identities and abstract away from the person's concrete, embodied existence. Similarly, his commitment to processes of public participation in which a multiplicity of voices can be heard has the capacity to confront supposedly stable identities with the counter-hegemonic potential of difference and dissent. Finally, his appreciation of the limits of judicial power in a complex, pluralistic society and his search for innovative ways in which courts can, nevertheless, honour their obligation to uphold the Constitution are reminiscent of memorial constitutionalism's bent for styles of adjudication which eschew celebratory discourse, yet keep pushing against the limits of conventional understandings of the judicial function.

3.4 (Nie) wieder! Memorial constitutionalism at the limit

In Roberto Bolaño's novel *Distant star*[59] the narrator recalls some of the horrors of the Pinochet regime in Chile. The figure of Carlos Wieder stands at the centre of his attempts to come to terms with the past. In the early 1970s he attended the

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[57]401 (emphasis in the original omitted).
[58]407.
[59](2004).

same poetry workshop as Wieder, who was then known as Alberto Ruiz-Tagle. After the military coup in 1973 Wieder reinvented himself as an assassin and, subsequently, a lieutenant in the Chilean air force. He found a way of combining his poetry with his career as a pilot by writing messages in the sky. His poetic performances soon made him famous, and he started planning a photographic exhibition to complement his aerial poetry. It was this exhibition, containing hundreds of photos of persons – mostly women – who had been tortured and murdered by the regime that precipitated his fall from grace. Years later, the narrator again finds himself directly confronted with these memories when he is hired by a private detective to use his hermeneutic skills to help him find Wieder.

The figure of Wieder continues to haunt the surviving members of the poetry workshop, even at a time when his literary traces grow fainter and fainter. For them, the past trauma that he represents is not something that can simply be laid to rest. Even his name hints at something recurring, something happening again and again. At the time of his first display of aerial poetry a madman in the concentration camp declares that the 'Second World War is returning to the Earth. All that talk about the Third World War was wrong; it's the Second returning, returning, returning'.[60]

Wieder's work conjures up shades of the dead. These shades are sometimes so fleeting that the public hardly notices them (eg, when he writes the names of dead women in the air). At other times (the photographic exhibition) they are so shocking that there is also something ephemeral about them. His cold, uncompromising gaze confronts the public with the horrors that are perpetrated in their name, at the same time that the violence, patriotism and extravagance of his art implicate him in these horrors.

This history remains elusive for the characters trying to come to terms with it. Increasingly, their recollections and reconstructions of past events come to depend on the 'melancholy folklore of exile' and represent but 'fabrications or pale copies of what really happened'.[61] At times, their efforts to make sense of past events get wrapped up in an almost comical series of wrong turns and dead ends. And despite the determination of one of the characters 'not to blink, not to let his subject ... disappear over the horizon',[62] Wieder vanishes, his name all but erased from the national memory.

The story sounds a cautionary note about the limits of memorial constitutionalism. Like those in the novel who are determined not to forget, we suffer, invariably, from memory lapses, as time envelops once distinct memories in its hazy cloak. Like those desperate to forget we find that the past's ghostly presence continues to haunt us. In short, we are too far removed from the past to have direct access to it and too close to it to maintain a critical distance. Suspended between an oblique past and a presence that still bears its imprint, our understanding of past injustices is necessarily partial.

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[60] *Id* 26-27.
[61] *Id* 66.
[62] *Id* 109.

But then again, memorial constitutionalism does not claim to present us with a comprehensive narrative which chronicles all past instances of injustice, discrimination and exclusion. Memorial constitutionalism refuses the monumental urge to represent all past suffering and to erect a new – inevitably exclusive – collective identity upon its foundations. According to Wessel le Roux, memorial constitutionalism, like the counter-monument aesthetic movement, arises precisely out of the 'limits of the imagination, the limits of our ability to turn ... records of suffering into a totalising and redeeming national story'.[63] Inscribing itself at the limit of representation, it grounds our responsibility to past victims not in an all-encompassing monument or narrative, but in the impossibility of doing justice to them:

> The voice of the victims can be heard only obliquely, in or as the disruption of the well-maintained symmetries of public space and public dialogue. Our relationship with and responsibility to the victims of past injustices remain asymmetrical, non-reciprocal, and thus will never be completely assimilated into the shared dialogue of a collective 'we'.[64]

In the face of the impossibility of ever squaring up to the horrors of the past, the best we can hope for is to keep open spaces of remembrance in which the closure induced by official histories, which are almost invariably inscribed in exclusive, nationalist discourses, can be disrupted and challenged.[65] Sachs J's memorial jurisprudence honours the memory of past victims by refusing the inscription of the intergenerational community invoked by the Constitution in a single grand narrative or narrow nationalist project. It allows the supposed unity of the people to be interrupted, again and again, by the singularity of claims that do not fit comfortably in sanitised and exclusive narratives about a heroic past.[66]

4 The politics of interpretation revisited

Sachs J's jurisprudence provides the outlines of an understanding of the politics of interpretation that is at once more realistic than traditional understandings, and better equipped to resist the pull of conservative assumptions about law and the judicial function, on the one hand, and collective and individual identities, on the other. His

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[63]'War memorials, the architecture of the Constitutional Court building and counter-monumental constitutionalism' in Le Roux and Van Marle (n 56) 65 at 70.

[64]*Id* 70-71.

[65]Drawing on the work of Johan Snyman (see eg, Snyman 'Interpretation and the politics of memory' in Bradfield and Van der Merwe (eds) *'Meaning' in legal interpretation* (1998) 312), Le Roux (n 63) argues that it is only through a refusal of a representational aesthetic and a 'sublime intensification of the limits of the law' that we can resist the closure inherent in nationalistic projects of remembrance and register a 'limitless obligation beyond the available norms of the existing legal order'. *Id* 86.

[66]The notion of refusal developed by Karin van Marle and subsequently taken up by other commentators captures something important of this counter-aesthetic. See Van Marle (ed) *Refusal, transition and post-apartheid law* (2009).

interrogation of categories and oppositions that are deeply entrenched in legal thought challenges the conservatism of legal culture, while his reconstructions of past disadvantage resist the closure inherent in official histories and nationalist discourses. The priority he affords to the participation and voice of those affected by laws can, moreover, help to break open both the law's tendency to insulate itself from social practice and the exclusivity of official constructions of the past.

The literature on memorial constitutionalism nevertheless gives reason for caution. While it is possible to disrupt the self-enclosure of a political community through the memorialisation of past suffering, exclusive histories and nationalist discourses continue to exert a powerful hold on the legal imagination. Moreover, our understanding of the past is necessarily partial, and there is no guarantee that the voices – whether past or present – of the marginalised and disadvantaged will register on our inventories of injustice.

We also need to remain alert to the possibility that there is something inherent in the structure of recognition that limits our capacity to respond to injustice. In a recent essay, Hans Lindahl argues that the rhetoric of inclusion and accommodation rests on ideas of mutuality and reciprocity, and inscribes struggles for recognition into the unity of an existing legal order.[67] In terms of this logic, marginalised groups can move from the periphery towards the centre of society; they can, in the process, even alter the collective self-understanding of a political community. Inevitably, however, they are required to adopt a *constitutional* vocabulary, to appeal to a shared constitutional identity (or patriotism), to define their needs, aspirations and beliefs in terms that would not mark them as too different from the rest, to adopt political and litigation strategies likely to result in their integration into the mainstream. Differentiation, according to Hans Lindahl, is always *internal* differentiation. Difference is reduced, inevitably, to a variation of the same. Radical difference has no place in this taxonomy. To gain constitutional recognition, it needs to align itself to the principle of reciprocity, which conditions the accommodation of claims for the recognition of difference on the acknowledgment, on the part of those seeking recognition, of the legitimacy of the ground rules in terms of which such struggles for recognition are to be played out. Radical difference thus needs to transform itself into something less threatening.

Lindahl argues that liberal theories of constitutionalism share a structural blind spot in relation to claims for cultural distinctness where inclusion is the problem, not the solution. Individuals and groups which have been included in the polity against their will face a dilemma – they must either appeal to the constitution, and thus 'identify themselves as participants in a project with which they do not want to be associated',[68] or resist the logic of inclusion and reciprocity, and thus run the risk of not being taken seriously, as their acts of contestation fail to engage the normative project that is the constitution.

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[67](2011, forthcoming). References reflect the page numbers in the pre-published version which can be accessed at http://www.tilburguniversity.nl/faculties/humanities/dphil/staff/lindahl/recognition.pdf.
[68]*Id* 5.

The Constitutional Court's jurisprudence offers a number of examples of law's propensity for assimilating difference to a variation of the same. It has, for instance, been observed that the Court's affirmation and celebration of difference within the context of same-sex relationships could not escape the homogenising effect of its reliance on an idealised model of heterosexual marriage, and that this prototype, while having enabled a series of progressive judgments, has also produced judgments that are far less accommodating of relationships and expressions of sexuality that do not conform to the idealised norm.[69]

The Court's jurisprudence in the field of religious and cultural difference offers another example. The high water mark of that jurisprudence, with the exception of a few dissenting judgments in other cases, is *Pillay*,[70] the case concerning a learner wearing a nose stud as an expression of her religious and cultural identity. Significantly, this case was decided on the basis of the Promotion of Equality and Prevention of Unfair Discrimination Act, and not on the basis of the rights enshrined in sections 15 and 31 of the Constitution. The Court applies an exacting standard of review in cases in which discrimination has been demonstrated, particularly on the listed grounds. But even in *Pillay*, the search for an appropriate comparator almost ruined the applicant's case. This suggests that an applicant's prospects of success are greater in cases in which she can point to a straightforward case of discrimination, as opposed to a claim that she should have been afforded differential treatment. This, in turn, seems to support the conclusion that equality of treatment, rather than differential treatment, is the default position, and that majoritarian assumptions, beliefs and practices remain the baseline against which the legitimacy of cultural and religious practices is to be considered.

Consider, also, the *Prince* case.[71] There is little doubt that the unconventional nature of the beliefs and practices of the Rastafarian faith, combined with its otherworldly nature and lack of a hierarchical organisation, contributed to the majority of the Court finding against it. Adherents to this faith tend to be suspicious of the state, and do not bend over backward to accommodate the secular order. In fact, the problem for many Rastafarians may well be with their inclusion in, and not their exclusion from, the secular legal order. Even the dissenting judgments of Ngcobo J and Sachs J, which are exemplary in their insistence that the state accommodate the religious beliefs of Rastafarians, cannot escape this difficulty. Moreover, the instability of the distinction between the religious and non-religious use of cannabis creates the risk of their continuing harassment at the hands of the police, and raises the spectre of the state policing the boundaries of legitimate expressions of religious belief.

Inarticulate premises continue to exercise a powerful influence at a variety of interpretive levels. And yet, thanks to the critical jurisprudence of Sachs J, the

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[69]See, eg, De Vos 'The "inevitability" of same-sex marriage in South Africa's post-apartheid state' (2007) 23 *SAJHR* 432.
[70](N 34).
[71](N 8).

politics of law looks a little less impenetrable than it used to. Perhaps Sachs J's greatest contribution as a judge lies in the way in which he openly engaged the politics of interpretation and managed, in a variety of contexts, to expose the powerful subterranean influence of unstated assumptions to the light of critical reflection. His jurisprudence does not claim to provide us with a floodlight which illuminates the furthest corners of the law and renders the whole legal enterprise transparent. However, the torch that he offers us can penetrate surprisingly deeply into the recesses of legal politics, and has already provided important glimpses into contexts and stories – both past and present – which confront the law with the injustices legitimated in its name.