

## Revelation and Legitimation in Albie Sachs's *The Strange Alchemy of Life and Law*

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### **The Politics of Judicial Life-Writing**

The judicial memoir is a paradoxical genre, since “the judicial role demands concealment and suppression of precisely those personal aspects of life which an autobiography exposes to view” (Ray 707). Tension arises between the ethical obligations of disinterestedness, impartiality and confidentiality imposed on judges, and the revelatory impulse animating autobiography. Vexed and politically charged questions concerning propriety confront judges embarking on autobiographical ventures. To what extent is it acceptable for a judge to make public information, or opinions, relating to colleagues on the Bench, or to cases heard and judgments rendered (either by the author or by his/her peers), or to the workings of courts in which he or she has presided? Is it appropriate to disclose information about the author's private life or his political commitments? May judges pronounce publicly on the nature of the judicial function?

South African judges who wrote memoirs or autobiographies during the apartheid era tended to disclose little of their emotional lives and revealed few glimpses of their private selves. Most considered their judicial performance adequately explained by the reasons they offered in their (published and unpublished) judgments. Judicial autobiographers on the whole avoided entering into political debates, including debates concerning the role of the judiciary. The pronouncements of two apartheid-era Chief Justices exemplify this convention. According to L. C. Steyn (during whose term of office the “legal temperature, already chill for the survival of human values and the preservation of fundamental freedoms, turned several degrees

colder” [Cameron, “Legal Chauvinism” 40]), it is improper “for a judge to rush into a political storm or into the wake of it, in a strongly contested matter in which Parliament has [. . .] laid down what is to be done” (Steyn 107). Newton Ogilvie Thompson writes in similar fashion that “[a] measure of aloofness attaches to judicial office [. . .] the expression in public [. . .] by judges of opinions on controversial issues [. . .] is to be deprecated” (Ogilvie Thompson 32). The convention against judges joining public debates allowed judges, influenced by their race, class, background and ideology, to conceal their ideological biases, even as they gave effect to them in their decisions.

### **Post-Apartheid Judicial Life Writing**

As background to my consideration of the post-apartheid judicial memoir, *The Strange Alchemy of Life and Law* by former Constitutional Court judge Albie Sachs (Sachs, *Strange Alchemy*), I shall survey, in order of publication, three memoirs of South African judges who were either Constitutional Court judges at the time their books appeared, or who were subsequently appointed to this office. These autobiographies differ significantly in the extent to which their authors reveal the sensations and imagination that animates their inner world. Yet these works have important commonalities. All comply with the duty of confidentiality that precludes divulgence of interactions with judicial colleagues with respect to cases they must decide. Further, although none contests the force of the convention against judges’ publicly expressing views on controversial political matters, all to some extent reflect an interpretation of this convention as permitting forms of political expression and advocacy that would have been considered improper during apartheid.

In *For Humanity: Reflections of a War Crimes Investigator*, Richard Goldstone, who retired from the Constitutional Court in 2003, relates his experiences as a judge of “ameliorat[ing]” (5) injustice and improving the conditions of detainees in his capacity as judge during apartheid, of investigating the causes of violence in South Africa during the transition from apartheid to democracy as head of the Goldstone Commission, and of bringing war criminals to justice as prosecutor with the United Nations Criminal Tribunals for the former Yugoslavia and Rwanda. Goldstone’s stated purpose is to place the experiences of his professional life on “public historical record” (xx) so that others will be able to learn from them. He enters the arena of political controversy by advocating, in the book’s final chapter, the establishment of an international criminal court, advocacy

which, though apparently in tension with the convention that judges abstain from partisan political intervention, he appears to consider legitimate in virtue of his participating in international law as prosecutor rather than judge (although he retains the title of judge throughout for prudential reasons).

As undeniably impressive as Goldstone's accomplishments are, as an autobiography *For Humanity* is artless and dull, partly because its prose is sterile and pedestrian, but mostly because he makes little attempt to render himself transparent to his readers. There are several possible reasons for this. One is that he intends to write for an academic readership. The way in which Goldstone frames his narrative may well be influenced by the aims of the Castle Lectures (that he delivered at Yale University in 1998 and on which his memoir is based), which are stated in the unpaginated preface to the book: "to promote reflection on the moral foundations of society and government and to enhance understanding of ethical issues facing individuals in our complex modern society." Goldstone may have considered professional rather than personal history as the required emphasis of the Castle Lectures. He may also have considered the revelation of the personal and private to be inconsistent with the convention of impersonality in judicial writing. Whatever his reasons, *For Humanity* compels a rueful assent to the truth of James Olney's assertion that, "the explanation for the special appeal of autobiography [. . .] is a fascination with the self and its profound, its endless mysteries" (Olney 23). Aside from expressing "despair" (5) at apartheid laws, frustration with the UN's allocation of funds to his office, and "regret" (116) at the US political leadership's unwillingness to proceed against the will of its military leadership, Goldstone declines to expose his inner self to scrutiny. There is little evidence of uncertainty or internal struggle. Nor is there any revelation of an errant self inconsistent with his public persona. He makes almost no effort to communicate affect or sensation. Instead we are offered banalities as exhaustive descriptions of his responses to momentous events: "one of the most exciting days of my life" (20) (the inauguration of Nelson Mandela as President in 1994); "Few lawyers would not regard that privilege as the pinnacle of his or her career" (22) (his offer of an appointment to South Africa's Constitutional Court); "memorable" (106) (the ceremony opening the Constitutional Court).

Goldstone's private and domestic life, access to which might have served to enliven, and possibly leaven the narrative, is relegated to the margins of this text. His wife, Noleen, and children, enter only fleetingly, seemingly to avoid distracting attention from, and perhaps also to compel admiration for, the public figure at its centre taking charge of and shaping the public

narratives of history and politics. His other relationships are equally perfunctorily described. There are no references to friendships outside of work, and work friends are characterized shallowly: one is “deep and supportive” (78); another is “abl[c] as a prosecutor and lawyer” (80), as well as “exceptionally gifted in office management” (80); a third is “not only astute but, above all, a warm and generous man” (83).

*The Free Diary of Albie Sachs* (Sachs, *Free Diary*), Sachs’s fourth memoir, is a diary of its author’s experiences as a constitutional court judge abroad. He is travelling as a tourist, but also “constitutional evangelist” (33), eagerly communicating to assorted European friends and audiences the “richness, the tensions, the reverberations, the bells and thunderclaps” (183) accompanying the transition to a constitutional democracy in South Africa. Sachs’s memoir diverges in several respects from Goldstone’s. It is formally experimental, “a dialogue [. . .] between a judge in late middle age travelling today and his intensely idealistic younger self” (228). In addition to his weaving of experiences of his younger self into the text, his partner and companion, Vanessa, writes a counterpoint at intervals, reflecting on the pleasures and frustrations of their travels and representing the voice of the racial, gendered and younger ‘Other’ – her prominence in the text contrasting dramatically with Goldstone’s wife’s near-absence in *For Humanity*. Unlike Goldstone, Sachs renders himself transparent to readers, conveying effusions of “self-achieving delight and wonder” (30), but also admitting to discomfort, ambivalence and confusion, as well as confessing to “peevisish thoughts” (177) and moments of vanity and competitiveness (189). He understands that the principal interest the judicial memoir holds for ordinary people (his intended readership) resides in its promise to humanize its author by presenting his work through the prism of biography and personality. If *The Free Diary*’s revelations of Sachs’s interiority depart from the impersonality that characterizes the conservative judicial aspect exemplified by Goldstone’s memoir, it is because Sachs does not aspire to conform to the convention of judicial reserve, preferring instead to “[resist] the hydraulic pressure to look like, speak like and behave like ‘a real judge’” (24). (Sachs’s individualism translates in his judicial performance into an identification with the marginalized, the figure in pursuit of freedom from the constraints of a conformist society – a concern which grounds his determination, stronger than that of most of his judicial colleagues, to protect the rights of minorities and assorted nonconformists against “the impositions of orthodoxies of behaviour or belief by the state” [67]).

Unlike *For Humanity*, *The Free Diary* is an example of what Karl Weintraub identifies as “that proper form of autobiography” in which “a

self-reflective person asks 'who am I?' and 'how did I become what I am?'" (Weintraub 1). Sachs's impulse to interrogate his own identity is evident at a formal level in his setting up of the conversation between his younger and older self and in his reflections on the alteration of his convictions occasioned by his transition from struggle activist to judge (Sachs, *Free Diary* 17). It is equally present in his European lectures and addresses. "Who am I?" enquires Sachs of a group of youths meeting "to discuss the question of identity" (56), before proceeding to describe the manifold constituents of his identity: "white, male, South African [. . .] in late middle age, a Jew, I am a judge, a writer, a traveller, a speaker;" subsequently he interrogates "what it means to be a Jew" (103).

It is Sachs's split judge/traveller/writer identity that convinces him of his entitlement to make the revelations he offers in *The Strange Alchemy*. He strongly implies that he would have preferred, instead of writing a diary of his European travels, "to deal with my life on the Court, the exciting discussions we have, the intense interaction of philosophy, body language and linguistic styles of my colleagues" – but that he is prevented from doing so by "the principle of confidentiality" (145). Yet he is permitted, he claims, a margin of indiscretion as a "traveller," "a judge at large" abroad, to which he would not be entitled as a "judicial officer on the bench," "a dignitary with an assigned role in the scheme of things" (145) in his home country.

Sachs's disclosures extend to exploring connections between his life experiences and his resolution of cases that have come before the Constitutional Court. For example, his recollection of being beaten at school, daily for several months, and of overhearing, whilst in solitary confinement during apartheid, the screams of prisoners reacting to court-ordered physical chastisement, impresses on Sachs the urgency of "guaranteeing the right of everyone to be free from violence" (84), which subsequently motivates his rejection, as a judge of the Constitutional Court, of a claim by a group of Evangelical Christian teachers for an exemption from legislation proscribing corporal punishment in schools.

In *Witness to Aids* (Cameron, *Witness*), Edwin Cameron (at the date of publication, 2005, a judge on the Supreme Court of Appeal, appointed to the Constitutional Court in 2008) engages in HIV/AIDS activism in a way that is, in contrast to Goldstone's memoir but like Sachs's, emotional and self-reflective. He bears witness to his personal struggle with AIDS, viscerally evoking his disgust and horror at his own symptoms. He movingly relates his inability to inform family and friends of his diagnosis with HIV, passing the following three years "in a treeless tundra of my own voluntary creation," horrified by "the inner sense of contamination" and

"ashamed [. . .] tainted, soiled, polluted" (51). With the onset of AIDS symptoms, his "resplendent robes" provide him with "a full-body disguise" (31); his disclosures concerning his own case in *Witness to AIDS* represent, conversely, a "disrobing in a sense, for the effect is that we see him [. . .] in all his fragile humanness" (Polatinsky 58).

His project shares concerns with Susan Sontag's *Illness as Metaphor and AIDS and its Metaphors* (Sontag): "to rectify the conception of the disease, to de-mythicise it" (Sontag 7) by challenging the metaphors and significations projected onto it which, by imputing to sufferers delinquency and culpability, both inhibit them from seeking treatment (eliciting intense shame as sufferers internalize fictions of retribution for licentiousness, and experience the fear of stigmatization generated by these same fantasies) and ground the denialism that has historically obstructed effective government policy in response to the HIV/AIDS epidemic. Chapter Two, for example, is titled "Just a virus, just a disease" (42). Like Sontag, Cameron registers that the metaphors which flourish around the disease are what kill many sufferers (Sontag 102). And like Sontag, Cameron recognizes that it is desirable for HIV/AIDS "to come to seem ordinary" (Sontag 181). As he puts it, "[i]f we can talk about it we normalize it. And the sooner AIDS becomes a normal disease, the sooner we will be able to deal with it unemotionally and effectively" (Cameron, *Witness* 61). Cameron explores connections between the vocabulary and categories of law and those of the moralism that surrounds HIV/AIDS: responsibility, culpability, retribution. He implies that a common fictional element underlies harsh moralism and severe criminal justice in that both impute strict responsibility and culpability, for which intense, prolonged suffering is deserved. A disagreement between Cameron and a colleague about whether a confessed fraudster should be sentenced to a prison term or community service is resolved in favour of Cameron's merciful stance: "He, too, would have a second chance. A sentence hanging over him – admittedly not a death sentence – would be remitted" (38).

Cameron's witnessing extends the discourse of testimony beyond its "routine use in the legal context – in the courtroom situation" in which "testimony is [. . .] called for when the facts upon which justice must pronounce its verdict are not clear, when [. . .] both the truth and its supporting elements are called into question" (Felman 6). He draws on his training and experience as a judge – his facility with legal technologies of truth and disputation – to counter the "*crisis of truth*" (Felman 6) that surrounds HIV/AIDS. His aim is to expose the "irrationality and obfuscation" (Cameron, *Witness* 117) of government policy responses, including the denialism of the Mbeki administration, as well as the "close-

fisted patents policies of the drug companies" (109). By contrast with Sontag's engagement with representations of disease in literature, Cameron's approach is empirical and policy-driven, focusing as it does, with reference to medical and social scientific studies, on HIV/AIDS in South Africa.

Yet Cameron is sensitive to the tension between his partisan advocacy and the injunction, which he supports, that judges refrain from participating publicly in debates over matters of political principle. He rehearses as reasons in support of this requirement that political engagement by judges may call into question "the impartiality and dispassion of the judiciary as a whole" (150) and threaten the "comity" (150) between the legislature and the judiciary. He invokes a natural law defense to the charge, brought by one government minister, that his HIV/AIDS activism has violated the principle against judicial involvement in politics: "the principle is not inviolate. Judges may be compelled by their personal position, by high dictates of conscience, or by moral demands of a particular situation, to speak out clearly and forcefully on matters of current controversy" (151).

### Life and Law

Described elsewhere as "the most 'literary' of lawyers" (Macdonald 343), Sachs has throughout his adult life combined his professional interest in the law with the practice of life-writing.<sup>1</sup> In his most recent memoir, *The Strange Alchemy of Life and Law*, Sachs, having retired from the Constitutional Court in 2009, reprises and expands upon certain of the concerns and themes featured in *The Free Diary*. These include, principally, his revelation of connections between his life experiences and his legal judgments, underpinned by his insistence that "as long as we are judges and not computers, an element of ourselves must inevitably and properly go into our decisions" (Sachs, *Free Diary* 197), his setting out of a judicial philosophy of constitutional adjudication (203–208), and his defence of the use of rhetoric as part of the judicial performance (197). These are the aspects of *The Strange Alchemy* that I shall explore in the remainder of this essay.

At the level of form, Sachs deliberately transgresses, to a degree that exceeds his practice in *The Free Diary*, what Jacques Derrida describes as the fundamental 'law of genre:' the injunction that "genres are not to be mixed" (Derrida 223–25). *The Strange Alchemy* evidences a desire to experiment formally with and blend what have traditionally been considered very different writing forms. Sachs's purpose is to bring about inter-generic

traffic among autobiography, political apology and jurisprudence by interweaving autobiographical writing ('life') with writing in which he reflects on cases the Constitutional Court has decided, offers legal and political commentary, and articulates his judicial philosophy ('law'). He facilitates inter-generic negotiation in a further way: through the inclusion of excerpts from his and other judges' judgments at the end of all but one of his chapters. The effect of all of this is to connect his personality and experiences with his professional career and conduct, in a way that suggests that each shapes the other.

Several of the chapters – two, four, six and eight – are not conventionally autobiographical. They do not conform to Philippe Lejeune's influential description of autobiography as "retrospective prose narrative, produced by a real person concerning his own existence, focusing on his individual life" (Lejeune 192). They offer instead a description of the process by which Sachs reaches his decisions, an account of how he writes his judgments, and an exposition of his jurisprudential commitments. Some of the chapters in which he relates experiences from his past conform only in part to Lejeune's definition of autobiography. Most of Chapter Three, for example, in which he recounts an encounter with Henri, the apartheid security policeman responsible for planting the car-bomb that destroyed his right arm, is devoted to a justificatory defence of the TRC. In Chapter Seven, in which he describes his involvement in socio-economic rights cases decided by the Constitutional Court, his purpose is primarily to provide background to and reflections on these cases. This chapter contains few intimate revelations of the author's private self. Chapter Nine commences with his recollection of his participation in a gay pride march and his attendance at a conference organized by Christian Lawyers for Africa. But this is a prelude to his central preoccupation in the chapter, which is to reflect on the Constitutional Court's far-reaching decision, which he authored, legalizing same-sex marriage (*Minister of Home Affairs and Another v Fourie and Another*<sup>2</sup>). He focuses on the facts of the case, the various arguments and perspectives presented before the court and the court's decision, rather than on himself.

Autobiography in the conventional sense is not Sachs's main concern in *The Strange Alchemy*. This is clear from the fact that most of the overtly autobiographical sections reproduce or expand upon descriptions of, and reflections upon, experiences already recounted in previous volumes of memoirs. In Chapter One of *The Strange Alchemy*, for example, he tells of his experience of "compulsive durance" – "close confinement accompanied with the adventitious severit[y] of solitude" (Bentham 315) – already described in *The Jail Diary*, and the torture by sleep deprivation earlier



recounted in *Stephanie on Trial*. In Chapter Five, he relates an anecdote, reproduced from *The Soft Vengeance*, about a joke he told after regaining consciousness following the bomb detonation in Maputo; and in Chapter Three, drawing on *The Free Diary*, he tells the story of his forgiveness of Henri after Henri testified before the TRC. His intention is to juxtapose the autobiographical material drawn from earlier memoirs with his legal writing to provide “glimpses of a [...] chemistry between my non-judicial life experiences and my decision-making as a judge” (Sachs, *Strange Alchemy* 4) – as, indeed, the title of the book suggests. In so doing, he intimates that the “brief” of his book is not self-revelation, political protest or political apology.

Sachs reveals several examples of the way in which his life experiences have shaped his decisions. For example, as a result of his meeting and reconciling with Henri,

the theme of reconciliation had lodged itself deeply into my legal consciousness, surfacing rather strongly in two of [my judgments]. One emphasized the role of apology as a restorative justice response to defamation (libel). The other stressed the role of mediation in reconciling the rights of poor landless people with those of wealthy landowners on whose vacant property they had erected shacks.

(5)

A second instance concerns how “growing up in an actively anti-religious home” and the “experience of being a non-believing child in a religious school environment seems to have predisposed [him] strongly towards supporting rights of conscience” (119). The result of “exploring deep interior thoughts about God, and refusing to pretend [sic] a belief I didn’t have” was that “at an early age my conscience was fashioned by the question of belief, and by the centrality of belief in establishing who you were as a person” – the further result of which was “a life-long respect for believers of every kind” (235).

Sachs shows how his respect for religious belief and believers translates into a special solicitude, in his performance as judge, for claims by the religious for exemptions from restrictive laws, to permit them to engage in otherwise illegal religious practices. For example, in his dissenting judgment in the *Prince* decision (excerpted at 219–23),<sup>3</sup> he rules that a Rastafarian trainee attorney should be granted a limited exemption from legislation proscribing the possession of cannabis so as to enable him to use cannabis for sacramental purposes. Sachs also insists in his *Fourie* decision, in which

he determined that the failure to extend the option of marriage to same-sex couples was unfairly discriminatory, on the right of Marriage Officers who object on religious grounds to marrying same-sex couples to refuse to “celebrate marriages in a way that would violate their religious consciences” (249).

Sachs reveals fascinating links between his experience of apartheid legal injustice and his decisions. In *Fourie*, he rejects a suggestion that South Africa should follow the civil partnership approach adopted in the United Kingdom, an approach justified on the grounds that it avoids the word ‘marriage’ and so refrains from interfering with the institution of marriage even as it affords the same legal rights to homosexuals. He repudiates this approach as having too much in common with the decision in *Minister of Posts and Telegraphs v Rassool*,<sup>4</sup> in which the Appellate Division upheld the segregation of public amenities, distinguishing between discrimination coupled with equality and discrimination coupled with inequality, thereby endorsing the ‘separate but equal’ doctrine (as the US Supreme Court had done in *Plessy v Ferguson*). The equivocation around ‘marriage’ underlying the civil partnership compromise adopted in the UK puts Sachs in mind of the equivocation and, indeed, injustice inherent in the ‘separate but equal’ doctrine invoked in *Rassool*, where the court’s decision simply camouflaged the fact that “separation was invariably based on prejudice with a purpose of shunning the group to be segregated out” (252).

### Judicial Review in Constitutional Democracies

In Chapters Four, Six and Eight, Sachs reflects on the judicial function in modern constitutional democracies, including the issue raised by Cameron’s memoir: “whether it is institutionally appropriate for judges to take positions on highly controversial questions of the kind that are hotly debated in elections” (212). His answer is no, in general, though there may be exceptional cases – he may well have Cameron’s case in mind – in which “the judicial responsibility for being the ultimate protector of human dignity compels judges to enter what might be politically-contested terrain” (212–13). He is most interested in a different question, however – one with which judges in democracies have over the last two decades begun publicly to engage (e.g. McLachlin; Kirby, Barak; Breyer): what it is that judges do, or should do, when they carry out their institutional mandate (3).

Expanding upon an antipathy first expressed in *The Free Diary* (168), Sachs challenges what he considers a false depiction of the judicial function, subscribed to by, amongst other judges, US Supreme Court Justices Antonin

Scalia and John Roberts: “formalism” (203). As applied to judicial decision-making in modern constitutional democracies such as South Africa and the United States, in which judges are authorized to invalidate legislation inconsistent with bills of rights, formalism is the idea that judges should decide cases exclusively by applying pre-existing legal rules; that their decisions, if properly reached, are unaffected by factors personal to them such as ideology, personality and background. Formalists insist that since judging is a rule-bound activity, judges acting properly do not exercise discretion.

Sachs has no sympathy for such dissembling, as he sees it. In his view, formalism, which he describes as the idea that “the judge’s role [is] limited to ensuring that the formal rules established by the Constitution [are] maintained” (203), offers a misleading characterization of rights-based judicial review in modern constitutional democracies. This is particularly evident, he thinks, at the level of appellate and Constitutional Court review, where most cases involve “claims between right and right” (202). These are “borderline cases” that “resist straightforward resolution,” cases in which both parties have “a reasonable prospect of success” and in relation to which “the members of the court can quite honestly go this way or that” (50). In such cases, the relevant legal materials fail on their own to yield a determinate conclusion – constitutional rights, for example, lack the degree of linguistic precision necessary to provide clear guidance in conflicts that confront constitutional courts. Against the formalists, Sachs maintains that, since in “most cases” with which Constitutional Court judges are confronted, the legal materials are indeterminate, judges are bound to “exercise constitutionally controlled discretion” (205). This perforce introduces an irreducibly subjective dimension into judging, such that once all the elements to which due weight has to be given are drawn together, the composite picture that emerges will often vary from arbiter to arbiter (143).

The chapters of *The Strange Alchemy* in which Sachs considers the nature of judging exemplify American Legal Realism, the principal competitor of formalism in American jurisprudence. Realism is a descriptive theory of what it is (as an empirical matter) that judges do when they decide cases, and according to which legal rules (and legal reasons generally) underdetermine decisions in hard cases. Because of the indeterminacy of rules in ‘hard cases’ – meaning almost all the cases that come before the Constitutional Court – Realists insist that judges do exercise discretion. What, then, are the non-legal determinants of judicial decisions? Realists adduce evidence to show that the decisions of judges are influenced (at least some of the time) by their ideological inclinations, personality traits,

temperaments and experiences, which, to a greater or lesser extent, inform their conceptions of justice and fairness (e.g. Frank; Posner).

Like the Realists, Sachs seeks to “draw attention to the human reality of the judicial process,” the “complex interplay of forces – rational and emotional, conscious and unconscious – by which no judge could remain unaffected” (114) in the carrying out of his or her judicial obligations. In keeping with Legal Realism, and following US Justice William Brennan, whose philosophy of judging he claims to share (Sachs, *Strange Alchemy* 114), Sachs asserts that judging is not simply a matter of applying “pure reason” (114) or logic to particular facts, for other variables that influence judgment come into play, including judges’ “emotional and intuitive responses” to the facts of a particular case and the arguments presented, as well as their life experiences, which will “inevitably insinuate themselves” into judicial reasoning (119). By drawing attention to the connections between his own life experiences and ideological commitments, on the one hand, and his judgments, on the other, Sachs not only provides evidence for the validity of Realism, but also offers an uncommon insight into the actual determinants of some of the decisions he has reached.

Sachs’s candid admission that the personality, experiences and ideology of the judge influence the activity of judging nevertheless leaves him with the problem of reconciling judicial review with the Rule of Law: the idea that the law should govern and not the arbitrary will of a judge. If in the course of judging, judges exercise discretion that is influenced by a range of non-legal factors, in what sense do the rules actually prevail? What is to prevent us from viewing legal decision-making as simply “the quirky or idiosyncratic performance of the Nietzschean will to power” (Hutchinson 211)? How, in short, “can we deny formalism and affirm the rule of law?” (Radin 812).

Sachs’s response to concerns about subjectivity and idiosyncrasy in judging is to emphasize that even when the legal materials bearing on a case allow space for the exercise of judicial discretion, judges are nevertheless constrained by “controls against too much subjectivity” (143) built into their institutional context, including conventions that govern the practice of judging, as well as by the court’s collegial structure, which ensures that “unconscious predilections prompted by personal life experiences [are] mediated by the views of fellow judges” (58), so that “elements of undue personal subjectivity vaporize quickly in the cauldron of argument” (50). Another constraint against judges’ being excessively influenced by their intuitions, emotional responses (115) and life experiences that Sachs identifies is that they are obliged to justify their decisions using “principles,

rules and standards" (53) that have come to be accepted in the legal community.

The constraints to which Sachs refers plausibly dispel concerns about unbridled freedom of interpretation. Nevertheless, he is aware that judges involved in constitutional interpretation are never fully constrained: in the exercise of interpretative discretion, they bring their ideologies and personalities to bear to "make value judgments" (211) in a way that imbues decision-making with an irreducibly subjective, value-laden quality. This is the reason that judges disagree about "the weight to be given to the different elements to be placed in the scales" (209) and why they sometimes reach widely divergent conclusions in particular cases.

His awareness of the subjective nature of judging is behind Sachs's concern about the democratic legitimacy of the Constitutional Court's judicial review of legislation: the worry that in constitutional democracies rights-based judicial review allows unelected and unaccountable "judges to impose their subjective preferences on the democratically-arrived at decisions of the legislature" (203). The passages in which he responds to this worry are, however, among the least convincing in *The Strange Alchemy*. He denies, implausibly, that judges exercise power in a way that competes with that exercised by the legislature. In his catachrestic formulation, "our court does not express power, it restrains power" (91). This way of framing the judiciary's activities is unconvincing because, like their US and Canadian counterparts, South African Constitutional Court judges exercise immense power as they resolve disputes about issues that influence the daily lives of millions of South Africans – issues such as the moral acceptability of the death penalty, or the granting of amnesty by the TRC, or pornography, or the granting of religious exemptions. Sachs's formulation conceals the simple point that in order for judges to invalidate laws, and thereby nullify the exercise of legislative power, the Constitutional Court must itself exercise power.

Sachs holds that it is "an advantage for judges not to be accountable to the electorate" because it means that courts can interpret and apply rights undistracted by "undue populist pressure" (212–13). This may be so, but he seems unaware that the idea that judges have a greater capacity than ordinary citizens and their representatives (members of parliament) for reasoning about rights reflects an "epistemic elitism" (Nino 189). A more even-handed treatment of this topic than Sachs's would acknowledge the cost in democratic terms of taking important decisions about matters of principle out of the purview of ordinary citizens and placing them into the hands of a few black-robed judges. For there is some truth in the claim that, by

infringing as it seemingly does the democratic right of ordinary citizens to participate in public decision-making concerning matters of national import, judicial review constitutes a violation of popular sovereignty, an “insulting form of disenfranchisement” (Waldron 1346). I do not wish to suggest that the advantages of the institution of judicial review in South Africa are outweighed by its disadvantages. My claim is rather that although Sachs rehearses several valid arguments in favour of judicial review, he neglects to consider its shortfalls.

### Rhetoric and Legal Judgments

“Every judgment I write is a lie” (47) begins Chapter Two of *The Strange Alchemy*, “Tock-Tick: The Working of a Judicial Mind,” in which Sachs engages with the ontology of his written judgments. He does not mean that his purpose in writing his judgments is “to trick men’s brains” (Machiavelli 93); indeed, he hastens to censure mendacity in public life as destructive of the trust that forms the basis of a liberal democratic polity (Sachs, *Strange Alchemy* 49). Far from having to do with feigning and deception, this chapter is animated by their opposite – an ethical regard for sincerity and transparency. His aim is to reveal the “incongruity that exists between the surface character of my judgments [. . .] and the actual intellectual programme in terms of which [they] have been devised, created, constructed, and formalized” (51). He worries that the appearance of his written judgments “belies the manner in which [they have] been produced” (51), since they obscure the complexity of the process by which his decisions were reached.

Sachs evinces, to an extent unusual for judges and in a way that recalls US Justice Benjamin Cardozo’s attunement to the “architectonics” of legal judgments (Cardozo 352), a concern with rhetoric. For most judges, the charge that they employ rhetoric in their judgments would be viewed as an attempt to impugn their performance: it would be understood either as an allegation of insincerity – the use of ornamental language specifically chosen to persuade, rather than express the unbiased truth – or else as a departure from the pure and disembodied prose to which the majority of judges aspire, out of a concern that excessive preoccupation with textual design will distract (and will be viewed as having distracted) them from objective, rational decision-making. Sachs expresses opposition to the longstanding denigration of the use of rhetoric by judges. In *The Free Diary*, he expressed a desire to divest rhetoric of associations with “empty word-spinning” (an idea that of course has its roots in Socrates’s criticism in the *Gorgias*) and to

emphasize its importance to judicial reason-giving (Sachs, *Free Diary* 197). Consistently with his felt obligation to sincerity, he acknowledges in *The Strange Alchemy* not only the centrality to his judgments of the artifice of rhetoric, but also his having taken strategic advantage of the credit that rhetoric and style can procure for judges: he includes in his judgments references to abstractions like “the rule of law, fundamental rights and the independence of the judiciary” (Sachs, *Strange Alchemy* 57) to imbue them with “mystique” (56). Consistently with Justice Brennan’s challenge to the idea that judges should restrict themselves to the impersonal tones of the detached professional and Brennan’s sense that it is not illegitimate for judges to infuse their work with elements of their own distinctive natures (Brennan 3), Sachs confesses to “preening” (56) in his judgments, the “show-off that adds distinctive voice and register to the exposition” and that includes the use of “the resounding phrase or sharp image that is potentially memorable” (Sachs, *Strange Alchemy* 57).

### Revelation and Legitimation

There are not one but two interconnected aims that animate *The Strange Alchemy of Life and Law*. The first is revelation. More than any other South African judicial autobiography, Sachs exposes to view the cognitive and rhetorical facets of judicial performance and discloses connections between his life and the decisions he has reached. Since the publication of *The Strange Alchemy* two concerns have been raised about the appearance of such revelations in judicial life-writing. I have heard it said that judges should not publicly disclose biographical determinants of their decisions, since to do so is undesirably to supplement their written judgments in a way that suggests that these judgments are not exhaustive statements of reasons for their decisions. Applied to Sachs’s project in *The Strange Alchemy*, however, this concern is misplaced, since he nowhere provides new *reasons* for his decisions – reasons that supplement the reasons contained in his legal judgments – but instead offers *explanations* for why he considers the reasons that he provides in his judgments to have force.

A second concern is that, by revealing the personal and ideological determinants of judicial decision-making, memoirs like Sachs’s may have the effect of weakening the rule of law and the legitimacy of the judiciary in South Africa. If judicial decisions are shown to be partly determined by factors such as the life experiences and ideologies of judges, readers may form the impression that constitutional adjudication inevitably contains an element of contingency and luck – that the decisions reached by the

Constitutional Court are the product not of pre-existing legal materials but of the biographical circumstances of individual judges. But in fact, as Realist jurisprudence and the history of adjudication in South Africa suggest, decisions of South African judges have (inevitably) always been influenced by judges' life experiences and ideologies. In these circumstances, there is a strong epistemic (and democratic) argument in favour of judges disclosing to citizens the biographical and ideological determinants of their judicial decisions.

There are indications in *The Strange Alchemy* that Sachs's superogatory candour – his effort publicly to disclose as much as possible about judicial decision-making and render his performance transparent to an entire polity – is in fact motivated by a determination to *cultivate* the legitimacy of the Constitutional Court through increasing public understanding of its performance. In *The Free Diary*, Sachs confides that he is “desperately eager for the radically new institutions of democracy to achieve maximum legitimacy” (Sachs, *Free Diary* 148). If the legitimacy of the Constitutional Court is understood in the Weberian sense as a belief on the part of citizens that it is an appropriate, proper or just institution, such that citizens feel that its decisions ought to be followed even if burdensome, the Constitutional Court has since its inception experienced a “legitimation crisis” in the sense that it has been unable to generate the attitudes of allegiance, loyalty or identification on which legitimacy (in the Weberian sense) depends (Gibson and Caldeira 2003). Sachs's determination, evident in *The Strange Alchemy*, to afford the public an opportunity to know more about the personal, human side of judges, these usually remote and inscrutable dignitaries mantled in their robes of office, seems to proceed from his appreciation of a feature of legitimacy identified by Charles Taylor, among others: the legitimacy of an institution depends on those subject to its decisions understanding and valuing it (Taylor).

Sachs's impulse to legitimate the Constitutional Court explains the partiality of his discussion of the institution of judicial review to which I referred above. This is not to claim that his neglect of the disadvantages, in democratic terms, of rights-based judicial review represents a departure from the sincerity and candour he displays in his discussion of how judges work. It is rather to assert that his desperate eagerness to legitimate the Constitutional Court has distorted his perception of it, blinding him to the shortfalls and costs of judicial review. This partial blindness may not simply be a cost of legitimation, but its essence.



## NOTES

1. In his first autobiographical endeavour, *The Jail Diary of Albie Sachs* (Sachs, *Jail Diary*), he recounts his experience in October 1963, while a practising advocate, of being arrested in chambers by the security police and held without trial under the notorious '90-day' law so that information about his anti-apartheid activities could be extracted from him. *The Jail Diary* tracks the progress of Sachs's mental and physical deterioration, produced by prolonged isolation and enforced inactivity, and also details his strategies for resisting, and even outwitting, his captors. *Stephanie on Trial* (Sachs, *Stephanie*) relates Sachs's experience of defending Stephanie (who eventually became his wife) and others, charged with destroying state property in protest against apartheid laws. Sachs recounts how, during a subsequent spell of detention, the security police sought to induce him to co-operate with their interrogation by depriving him of sleep (Sachs, *Stephanie* 212–55). Much of *The Soft Vengeance of a Freedom Fighter* (Sachs, *Soft Vengeance*), his third memoir, is devoted to his coming to terms with his loss of physical wholeness and feelings of disempowerment and disconnection from others, following an assassination attempt by the South African government.

2. 2006 (1) SA 524.

3. *Prince v President, Cape Law Society, and Others* 2002 (2) SA 794.

4. 1934 AD 167.

5. 163 US 537 (1896).

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