The soft vengeance of a freedom fighter on the Constitutional Court*

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> Man muss [...] hierin nicht folgen, man kann es auch ganz anders sehen, man darf selbstverständlich auch für die drastischste Verfremdung eintreten, aber man sollte sich deswegen nicht für einen fortschrittlichen Menschen halten.
> Daniel Kehlmann 'Die Lichtprobe'[1]

1 Berlin, April 1968

On 11 April 1968, one week after the assassination of Dr Martin Luther King Jr in Memphis, Tennessee, Josef Bachmann, a 24 year old house painter, travelled from Munich to Berlin. Under his jacket he carried a pistol in a shoulder holster. In his bag were a second pistol and a newspaper cutting from the rightwing *Deutsche Nationalzeitung*, in which the newspaper demanded that the left-radical revolution should be stopped. Over a row of five pictures of student activist Rudi Dutschke, the newspaper's banner heading proclaimed that the student uprising, and specifically 'Red Rudi', had to be stopped. Similar articles, with pictures of Dutschke, had appeared in the newspapers – especially those published by the Springer publishing

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[1] *Festrede zur Eröffnung der Salzburger Festspiele*, 2009-07-25, http://kurier.at/kultur/1925770.php (2009-07-29). The open space [...] in the quote reads 'Kraus' in the original text, referring to the 'furious' essay of Karl Kraus 'Mein Vorurteil gegen Piscator' (original 1926, republished in *Unsterblicher Witz* 1961). Kehlmann refers to Kraus's protest against the impoverishing slippage in what is considered 'relevant' in modern German theatre: '"Aktuell", schrieb er, "ist die Überwindung des Zeitwiderstands, die Wegräumung des Überzugs, den das Geräusch des Lebens dem Gehör und der Sprache angetan hat. Für aktuell aber halten die Zutreiber der Zeit den Triumph des Geräusches über das Gedicht, die Entstellung seiner Geistigkeit durch ein psychologisches Motiv, das der Journalbildung" – also der Bildung des Journalismus – "erschlossen ist".' My paper does little more than argue that Albie Sachs always resisted the triumph of the noise of life over the poetry. And, pretty much in the spirit of Kehlmann, I would argue that one could obviously disagree with Sachs, but also that one could not therefore necessarily claim to be progressive.

house – for weeks.[2] Because of the openly inflammatory media campaign and its focus on his person, Dutschke's friends had been concerned about his safety for a while. Bachmann found Dutschke quite easily where he was waiting, not far from his apartment, for the chemist to open after the lunch break so that he could buy medicine for his three month old baby. Bachmann walked up to him, asked whether he was Rudi Dutschke and, having received the confirmation he was waiting for, fired three shots at point-blank range, wounding Dutschke in the head twice and once in the shoulder. Dutschke was seriously injured and spent the next year in hospitals in Switzerland and the UK recovering from the brain damage caused by the shots. He lost some short-term memory and had to learn to walk, talk and write again.[3] After his recovery he continued suffering from the effects of the gunshot wounds, including periodic epileptic seizures. In Aarhus, Denmark, on 24 December 1979 he drowned in his bathtub during such a seizure.[4]

On the one hand, the German postwar institutional powers had reason to be concerned about the role that Rudi Dutschke was playing in the growing wave of left radicalism and activism during the late 1960s, especially in student circles. Dutschke was clearly not only one of the leaders of the student protest movement, but the leading intellectual of the radical left. There could be no doubt that he was working for the world revolution as he saw it and he became famous for his theoretical dissertations on revolution as the 'long march through the institutions' and on the urban guerrilla.[5] On the other hand, though, Dutschke's understanding of the world revolution, and particularly his view of resistance and violence, was complex and ambiguous.[6] Prior to the assassination attempt he was torn between understanding for and resistance against the idea of violence and terror. After the assassination attempt he temporarily supported the idea of urban violence, but in time he reverted to his earlier ambiguous position, arguing in favour of conscious, planned illegal

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[2]On the day of the shooting *Bild*, published by Springer Verlag, declared in its main headline that Dutschke was 'Staatsfeind Nr 1!' I am indebted to Melodie Nöthling Slabbert for bringing the headline to my attention.

[3]In Dutschke *Jeder hat sein Leben ganz zu leben: Die Tagebücher 1963-1979* (2003) 71-80 the diary entries for the first months after the assassination attempt show how Dutschke first made notes of his friends' names to remember them, then started memorising words and concepts that he had forgotten, and finally started making notes on books that he was reading. The diary entries from the time reflect frustration and sometimes depression caused by the difficult physical recovery process. See further Dutschke *Wir hatten ein barbarisches, schönes Leben. Rudi Dutschke: Eine Biographie* (2007) 200-206.

[4]On the assassination attempt see Karl *Rudi Dutschke. Revolutionär ohne Revolution* (2003) 208-211; Ditfurth *Rudi und Ulrike: Geschichte einer Freundschaft* (2008) 13-23; Aust *Der Baader-Meinhof-Komplex* (2008) (3rd ed) 97-99; Dutschke *Wir hatten ein barbarisches, schönes Leben. Rudi Dutschke: Eine Biographie* (2007) 197-199. Bachmann was arrested and his life was saved in hospital after having taken an overdose of sleeping tablets. He was convicted and received a seven year prison sentence, but committed suicide while still in prison in 1970.

[5]Some of his famous lectures and writings on the topic are collected in Dutschke *Mein langer Marsch. Reden, Schriften und Tagebücher aus zwanzig Jahren* Dutschke-Klotz, Gollwitzer and Miermeister (eds) (1980). See 'Unser Prozeß der Revolution wird ein sehr langer Marsch sein' at 11-28, including several extracts from letters in the press, public lectures and interviews on the topic of revolution.

[6]The most complete analysis is by Karl (n 4) 40-165.

action, including violence against property, but not approving violence against persons.[7] This ambiguity resulted in his rejection of the choice of his former activist comrades and friends, such as Ulrike Meinhoff, who formed what later became the *Rote Armee Fraktion* (RAF) and who engaged in urban terrorism and violence. Eventually Dutschke joined the Green movement,[8] much like his contemporaries and fellow student activists Otto Schily,[9] Joschka Fischer[10] and Daniel Cohn-Bendit.[11]

One may well ask why I would choose to introduce a paper to celebrate the work of Judge Albie Sachs on the South African Constitutional Court with a

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[7]See Karl (n 4) 40-42, 253-257; Kraushaar 'Rudi Dutschke und der bewaffnete Kampf' in Kraushaar, Wieland and Reemtsma *Rudi Dutschke, Andreas Baader und die RAF* (2005) 13-50, 46-49.

[8]Joining the newly-established Green Party should not be seen as much of a departure for any of the 1960s student activists. What later became known as core Green issues, such as nuclear power, was always on the agenda of the left radicals, especially combined with their anti-war protests. On Ulrike Meinhoff's early participation (1957) in anti-nuclear protest see Ditfurth *Ulrike Meinhof: Die Biografie* (2009) 103-116; on Rudi Dutschke's position see Karl (n 4) 34, 120.

[9]Otto Schily was born on July 20, 1932. He studied law and political science and, after obtaining his diploma in 1962, started practicing law. As a student, Schily was involved in the student politics of the time, particularly in the German SDS's (Socialist Student Union) protests against the escalation of the Cold War and the bourgeois foundations of postwar Western society. He became famous when he appeared in a series of lawsuits revolving around the radical student protest of the late 1960s and the early 1970s, starting with the trial that followed the police killing of student protester Benno Ohnesorg (1967) and reaching its high point with his appearance as defence lawyer for the Rote Armee Fraktion (RAF) members Horst Mahler (1971) and Gudrun Ensslin (Stammheim 1975-77). See Araloff 'Otto Georg Schily: A rebel that became a minister' in *Axis Information and Analysis* (2005-10-12) http://www.axisglobe.com/article.asp?article=431 (2009-09-01). On this point see also Rüthers *Verräter, Zufallshelden oder Gewissen der Nation? Facetten des Widerstandes in Deutschland* (2008) 198 (the defenders all exceeded their legal briefs by a considerable margin.). Schily joined the Green Party in 1980. After losing the battle for the position as leader of the Green Party's parliamentary faction in 1989 he joined the Social Democratic Party (SDP). From 1994 until 1998 he was the deputy chairman of the SPD parliamentary faction, and in September 1998, after the victory of the SPD-Green Party coalition in the parliamentary elections the newly appointed Chancellor Gerhard Schröder appointed Schily as the Minister of the Interior, a post that he held until 2005, when he failed to secure the position of Foreign Minister in the new coalition cabinet of Angela Merkel.

[10]Joseph Martin (Joschka) Fischer, who dropped out of high school and never attended university, became active in the German left-wing student movement in 1967. He nevertheless attended lectures of Theodor Adorno, Jürgen Habermas and Oskar Negt. As member of the militant group *Revolutionärer Kampf* (Revolutionary Struggle) Fischer participated in street battles during the 1960s and 1970s, actions for which he later publicly apologised, without distancing himself from the radical student movement. His close friendship with Daniel Cohn-Bendit dates from this time. He has been criticised for participating in violent protests and for attending a conference of the PLO in 1969. According to Fischer's own account, the violent actions of the German autumn of 1977 made him renounce violence as a means of political change and he became involved in the newly-founded Green Party. From 1983 to 1985 he was a member of the Bundestag for the Green Party and when the Social Democratic Party of Germany, led by Gerhard Schröder, came to power in a coalition with the Greens in September 1998, Fischer became Foreign Minister.

[11]Daniel Cohn-Bendit, a German student who was one of the leaders of the May 1968 student uprising in Paris, entered parliamentary politics and joined the German Green Party in 1984. He is now co-president of the group European Greens–European Free Alliance in the European Parliament.

narrative about the German student activist Rudi Dutschke. Obviously, the German society against which Dutschke protested was struggling to free itself from the shameful past of Nazism that involved racial prejudice and grave crimes against human dignity; prior to 1994, Sachs was protesting against an apartheid regime that institutionalised racial discrimination and the denial of human dignity.[12] Like Dutschke, Sachs also struggled with the blurry line between activism, protest and violence.[13] There is also the connection between Dutschke's story and the failed assassination attempt on Albie Sachs in 1988 and his recovery from the scars it left.[14]

Yet, these parallels are too superficial to save the comparison from being self-indulgent and facile, or even misguided. For one thing, the comparison falters as soon as one considers that Sachs was protesting against the apartheid regime during its heyday; Dutschke was protesting against postwar German society. If one were merely looking for comparisons between figures from the 1960 student revolts in Germany and the 1960 anti-apartheid resistance in South Africa, there are more interesting examples than Dutschke and Sachs. We could, for instance, consider the paradox of the erstwhile freedom fighter, the 'terrorist', now sitting on

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[12]In pointing out these parallels I am not suggesting that the crimes of the German Holocaust are generally or at all comparable to the crimes of apartheid in South Africa. There are vast and crucial differences. It is also important to emphasise the fact that the German student revolt of the 1960s occurred after the war, while the South African events of the 1960s were situated in the context of a government that was entrenching and enforcing apartheid with increasing vigour and force.

[13]Like Rudi Dutschke, Albie Sachs could be described as a 'relatively non-violent' intellectual and political activist in the sense that both steered clear of public violence and terrorism, while publicly declaring their understanding and sympathy for at least some violent actions undertaken by political protesters. After having been detained without trial and prohibited from practicing law, Albie Sachs had to choose between active participation in subversive action and exile, and like Dutschke he opted for the latter, although he later expressed his regret for not being able to participate more actively in the underground struggle for physical and moral reasons. See Sachs *The jail diary of Albie Sachs* (1966, 1990) 103-105, 122-125; Sachs *The soft vengeance of a freedom fighter* (1990) 79; Herman 'Laudatio Judge A L (Albie) Sachs: Nooit Meer Auschwitz Lesing 2005' (2005-01-27) available at http://www.auschwitz.nl/files/laudatio_ sachs.pdf (2009-08-17).

[14]Albie Sachs practiced as a lawyer when he was first banned from participating in political activity in 1960. He was detained without trial and placed in solitary confinement for ninety days. He went to jail for a second time in 1966 and when he was denied the right to practice as a lawyer after his release, he went into exile in the UK, where he completed a PhD at the University of Sussex and taught law in the universities of Southampton, London and Cambridge. During that time he published a book on his experiences in prison, *The jail diary of Albie Sachs* (1966, 1990). Sachs returned to Mozambique as a professor of law in 1977. On 7 April 1988, a bomb that was placed in his car in Maputo by South African security agents exploded and he lost an arm and the use of one eye. He spent most of the next year in hospital in London recovering and learning to walk and write again. See Sachs (1990) (n 13), where Sachs describes his memories of the bombing and the recovery process in the first chapters. The descriptions of his struggle to recover are uncannily similar to those of Dutschke. In the 2nd ed (2000) xi-xxiv Scheper-Hughes 'Sacred wounds: Writing with the body' contributes an interesting analysis of this physical process of recovery.

the parliamentary bench from where her political actions had been outlawed,[15] or on the judicial bench from where she had been sentenced for crimes against the state;[16] the freedom fighter turned cabinet minister who launches through parliament the legislation that would grant amnesty to the former security officials who tried to kill him,[17] or the radical left lawyer turned cabinet minister responsible

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[15]Many examples can be cited, both from recent South African history and from abroad. The most outstanding South African example is certainly Nelson Mandela who, after having just recently made the decision to engage in illegal and violent protest action against the apartheid regime, was tried for sabotage. On 1964-06-11 he was sentenced to life imprisonment, most of which he spent on Robben Island. After his release on 1990-02-11 Mandela, amongst many others, engaged in political action towards the preparations for the writing of a new constitution and the first democratic elections. After the elections he became the first black President; he was inaugurated on 1994-05-10. See N Mandela *Long walk to freedom: The autobiography of Nelson Mandela* (1994) 251, 365, 549. Of course, many other recent and current South African parliamentarians and politicians have been convicted for political crimes during the apartheid era. Examples (by no means to be compared to Mandela) of German and European politicians who participated in the 1960 student protest movements are Otto Schily, Joschka Fischer and Daniel Cohn-Bendit; see (n 9-11).

[16]Examples are less numerous in this case since many activist lawyers managed to avoid prosecution and trial for criminal activities. If the late activist lawyer Bram Fischer, who was sentenced to life imprisonment on charges of sabotage and contraventions of the Suppression of Communism Act 44 of 1950 on 1966-05-09 and who died of cancer on 1975-05-08, had survived he would probably have become a Constitutional Court judge. See Clingman *Bram Fischer: Afrikaner revolutionary* (1998) 416. If Nelson Mandela were not destined for higher political position he would probably have become Chief Justice after 1994. As it happened, most South African struggle lawyers who ended up on the bench were never convicted of political crimes. Deputy Chief Justice Dikgang Moseneke was arrested at the age of 15, detained and convicted of participating in anti-apartheid activities. He was imprisoned on Robben Island for 10 years and completed his schooling and his first two degrees (BA in English and Political Science and B Iuris) through Unisa during this time. He completed his LLB degree through Unisa after having been released from prison and started his career as a legal practitioner in 1976. He acted as a judge in the Transvaal High Court for a while from 1994 and was later appointed on the Constitutional Court bench (in 2004); he became Deputy Chief Justice in 2005. See http://www.constitutionalcourt.org.za/text/judges/current/justicedikgangmoseneke/1.html. Albie Sachs was detained in 1960 and 1966 but was never tried. After the second detention he left to study in the UK (see (n 14)). Constitutional Court judge Sandile Ngcobo was never tried and sentenced, but he was also detained without trial for a year during the 1976 uprisings. As far as I am aware none of the prominent German activists of the 1960s became judges in the higher courts; Otto Schily might have pursued that route had he not chosen politics.

[17]Abdullah Mohamed (Dullah) Omar was born 1934-05-26. He graduated from the University of Cape Town with a law degree in 1957. He was an anti-apartheid activist from his student days, first in the Unity Movement and later in the United Democratic Front (UDF) and the ANC. In his legal practice he became known as a defence lawyer for members of the Pan Africanist Congress (PAC) and the African National Congress (ANC) and he was subjected to numerous banning orders and spells of detention without trial. In 1981 his passport was withdrawn days before he was to leave to study for his LLM in the UK; it was only restored to him in 1990. He served as the first Minister of Justice in the cabinet of Nelson Mandela from 1994 until 1999 and thereafter as Minister of Transport in the cabinet of Thabo Mbeki until his death on 2004-05-13. As Minister of Justice, Omar was responsible for the drafting and implementation of legislation for the Truth and Reconciliation Commission (the Promotion of National Unity and Reconciliation Act 34 of 1995), legislation that would provide amnesty for the security officials of the Civil Co-operation Bureau who planned or tried to kill Omar, first by planning to shoot him and then by substituting his heart medicine with poison (facts that came out during the hearings of the

for making and enforcing legislation that would preclude lawyers from defending accused 'terrorists' as he once defended others.[18] However, given the fraught moral issues even these parallels, interesting as they may be, do not justify reference to the 1968 student revolt in Germany as a backdrop for a discussion of Albie Sachs's work on the South African Constitutional Court. I have already referred to the fact that it would be superficial and irresponsible to simply compare the German Holocaust with apartheid in South Africa, even though both involved crimes against humanity. I have also referred to the fact that the fight for freedom against apartheid in which Albie Sachs participated was an example of direct resistance against oppression, whereas the German student revolt occurred some 20 years after the end of the war, in a constitutional democracy that had been established since the war and that was supposed to have cleansed German society of the legacy of Nazism. It is therefore clearly much more difficult to explain and justify the German student revolt of the 1960s than it is to justify the ANC resistance against apartheid. In fact, commentators have pointed out that a large part of the violence perpetrated by the RAF and others can simply not be justified at all.[19] My reflection on the work of Albie Sachs against the backdrop of Rudi Dutschke's story is therefore not to suggest that the two narratives are substantively comparable or that the two examples of resistance and revolt are equally justified or laudable.

Harms Commission in 1990). See the biography of Dullah Omar on News24 at http://www.news24.com/Content/SouthAfrica/News/1059/8b33b9fbeba34d32af80a0d3093b58f0/13-03-2004-08-13/Biography_of_Dullah_Omar and Wikipedia at http://en.wikipedia.org/wiki/Dullah_Omar.

[18] As Minister of the Interior Otto Schily, once active in student politics and the lawyer who defended several RAF members during the Stammheim trial, (see (n 9)) became responsible for the work of the Federal Criminal Service (BKA) and the Federal Service for Protection of the Constitution (BfV), both of whom were actively involved in prosecuting the RAF during the 1970s. As Minister, Schily launched several pieces of controversial anti-terrorism legislation through the German parliament, especially in the wake of the terrorist attacks on New York City on 2001-09-11. On the security legislation launched through parliament during his time as Minister of the Interior, see Zimmermann 'German Parliament agrees second anti-terrorism law package: Experts warn of destruction of democratic Rights' in *WSWS: World Socialist Web Site* (2001-12-05) http://www.wsws.org/articles/2001/dec2001 /germ-d05.shtml (2009-09-02).

[19] From the many current commentaries, Aust (n 3) is quite critical; see, eg, the 'Nachspiel' at 871-878. Aust was a contemporary of Meinhof and Dutschke and worked with Meinhof at the magazine *konkret* where she was an influential journalist before going underground. A cameo that Aust underplays in the book but that also features in the U Edel movie based on the book (n 33), shows how Aust removes Meinhof's twin daughters (after she had gone underground, see (n 21) from the care of friends in Italy and brings them back to their father, Klaus Rainer Röll, to prevent them from being placed in a Palestinian orphanage, which is what her RAF comrade Gudrun Ensslin considered suitable for the children of a revolutionary. Hermann 'Die Ohnmacht der Rebellen' is a contemporary critical reaction to the student uprising published in 1967, now republished in (2007) 2 *Die Zeit Geschichte: Das Jahr der Revolte* 40-41. An interesting analysis of the justification for and moral dilemmas posed by resistance in general is Rüthers *Verräter, Zufallshelden oder Gewissen der Nation? Facetten des Widerstandes in Deutschland* (2008). Rüthers discusses resistance during different eras, including the 1960s at 172-219.

My reason for starting the discussion of Albie Sachs's work in the South African Constitutional Court with a reference to the 1968 student revolt lies elsewhere, namely, in a more general reflection on the (real or perceived) reasons for the rise of radicalism and political protest in postwar Germany, particularly during the 1960s and 1970s. Again, by analysing and reflecting on these reasons I am not suggesting that the leaders of the student revolt were correct in their analysis or that they – and particularly those of them who formed or joined groups like the RAF – were correct or justified in their reactions to these perceptions.

Towards the middle of the 1960s, German intellectuals, workers and students on the left felt so marginalised by the direction that mainstream politics was taking that they were convinced that they had to resort to extra-parliamentary opposition,[20] which developed into violent extra-parliamentary protests[21] and finally, for some of them, the urban terrorism of the Baader-Meinhoff gang or *Rote Armee Fraktion* (RAF) that shook Germany, especially during the so-called German Autumn of 1977.[22] My interest in their reaction to mainstream politics is not to determine

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[20] *Außerparlamentarisches Opposition* (*APO*). The process of extra-parliamentary opposition started out with peaceful demonstrations that turned violent after the student protester, Benno Ohnesorg, was killed by a shot to the back of the head during a peaceful demonstration against the state reception for the Shah of Persia in Berlin on 1967-06-02. See Frei *1968: Jugendrevolte und globaler Protest* (2008) 112-130 on the links between the protest against the state reception of the Shah, the killing of Ohnesorg and the rise of eventually violent terror groups such as the 'Movement 2 June'.

[21] Ditfurth (n 8) 222 explains that the grounding of the RAF is often linked to the illegal liberation of Andreas Baader from police custody on 1970-05-14, an action that also marked Ulrike Meinhof's going underground and opting for a life of illegality. Ditfurth argues that there is no founding date for the RAF, just a number of moments, of which Baader's liberation and Meinhof's decision to flee with them and go underground was a crucial one. Another was the International Vietnam Congress presented in Berlin on 1968-02-17/18, where Rudi Dutschke presented the main paper on the historical conditions for the international liberation struggle.

[22] The terror campaign that became known as the German Autumn started on 1977-07-30, while the central RAF members Andreas Baader, Gudrun Ensslin and Jan-Carl Raspe were being held and tried in the maximum security Stammheim prison near Stuttgart (Ulrike Meinhof had committed suicide in the same prison on 1976-05-09), when a group of terrorists, including RAF members Christian Klar and Brigitte Mohnhaupt, shot and killed Jürgen Ponto, head of the Dresdner Bank, in front of his house in a failed kidnapping attempt. On 1977-09-05 Hanns Martin Schleyer, a powerful industrialist with an SS and NSDAP history, was abducted in a violent attack that left 3 policemen and his driver dead. The kidnappers demanded the release of a number of RAF detainees, including Baader, Ensslin and Raspe. On 1977-10-13 Lufthansa flight 181 'Landshut' from Palma de Mallorca to Frankfurt was hijacked by a group of four non-German terrorists who demanded the release of the RAF detainees, plus two Palestinians then held in Turkey. After having flown from Rome to Dubai to Aden (where the flight captain Jürgen Schumann was shot and thrown off the plane), the plane was eventually stormed by elite German military police and liberated while standing at the airport in Mogadishu, Somalia. Shortly after the news of the successful liberation of the plane was broadcast, RAF detainees Baader, Raspe and Ensslin were found dead in their cells at Stammheim, apparently having committed suicide; Irmgard Möller survived several stab wounds and was released from prison in 1994. On the same day, Hanns Martin Schleyer was killed by his kidnappers. See Aust (n 3) 645-845. Christian Klar, a second-generation RAF member, was arrested in 1982 and released on 2008-12-19, the last of the RAF prisoners from the 1970s. The Schlink novel *Das Wochenende* (2008) is probably based on the (then prospective) release of Klar.

whether the RAF or their sympathisers were correct in their assessment of the political situation or whether they were justified in responding as they did, but rather to understand the reasons for the existence of their perception that strong opposition against the direction of mainstream politics was necessary and that parliamentary opposition was impossible or futile. Eventually, I want to consider these reasons in the context of what was happening in South Africa at the same time and in the context of Albie Sachs's work in the Constitutional Court after 1994.

The literature suggests at least three factors played a role in the development of left dissent into extra-parliamentary protest and eventually urban terrorism in postwar Germany.

(a) Injustices of the past have not been dealt with adequately

The first reason put forward for the dissatisfaction and eventual unrest, protest action and open revolt in left and critical German circles during the mid-1960s is the left's widespread impression that certain injustices of the past had not been dealt with or solved in postwar German society.[23] This point relates to several aspects of what was happening in the aftermath of the war. On the one hand, there was a feeling that, instead of the full exposure of war crimes, the facts about criminal activities and the identities of those involved were being denied or covered up by the government and by society at large. In this respect the protesters of the left were particularly unhappy about the fact that members of the erstwhile National Socialist German Workers Party (NSDAP) and high ranking officials of the Nazi regime still occupied powerful and influential positions in politics, in the police and in the army.[24] A related concern that also involved the anti-war theme of many student protests and demonstrations during the 1960s was that the German Army, which was allegedly still controlled by old *Wehrmacht* officers from the Nazi era, was preparing to join NATO and to re-arm itself with

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[23]In making this point I rely primarily on my reading of various sections and passages from Ditfurth (n 8), eg at 59. See further Frei 'Aufbruch der Siebenundsechziger' (2007) 2 *Die Zeit Geschichte: Das Jahr der Revolte* 18-30 23-28; Frei *1968: Jugendrevolte und globaler Protest* (2008)117-118, 134-140. When the protesting students referred to the injustices of the past they were of course talking about the Nazi past before and during the war, in other words a past that was over by the time they were protesting in the 1960s. As will appear from the discussion below, this was different in the case of Nelson Mandela: when he referred to past injustices apartheid was still in place and the injustices were far from over – Mandela's past was therefore an ongoing one in a much more immediate sense. I am indebted to Sue-Mari Maass for bringing this disparity to my attention.

[24]Franz Josef Strauß, former leader of the conservative Christian Social Union party (CSU), federal cabinet minister and Minister-President of the state of Bavaria, was a prime target of left protest and demonstrations. Kurt Georg Kiesinger, who became Chancellor in 1966, had been a member of Hitler's NSDAP party between 1933 and 1945 and was deputy director of the radio propaganda department of the Foreign Ministry during the war. The Allies interned him for eighteen months, but he was cleared of crimes after the war. Ulrike Meinhof's own father and family, as well as her adoptive stepmother Renate Riemeck, had carefully papered over the Nazi connections in their personal lives and careers before 1945. See Ditfurth (n 8) 20-25; 34-40. See also Rüthers (n 19) 210-214.

atomic weaponry.[25] Similarly, the protesters took offence against the fact that the German state gave official recognition to politicians from regimes that the left critics regarded as corrupt or oppressive – the official state reception of the Shah of Persia was a major source of protest and led to violently suppressed demonstrations and the death of student protester Benno Ohnesorg on 2 June 1967.[26] The fact that German businesses, some with links to the old regime, were building ships for the oppressive regimes in Portugal and Spain was another reason for anti-war inspired protests to the effect that the past had not been dealt with adequately.

(b) Old social hierarchies have survived and still exist after the war

Anti-authoritarianism,[27] the left's second theme during the 1960s and 1970s, was based on the perception that the old social hierarchies had survived the war and that these powerful pre-war authoritarian structures and attitudes continued to uphold the traditional inequalities in society, to exclude minorities and outsiders, and to oppress dissent and opposition. Instances of authoritarianism that the protesters complained about included the continued existence of pre-war social hierarchies in German society,[28] the enduring threat that the German government would adopt emergency legislation to outlaw and suppress dissent, and the violent oppression of peaceful demonstrations. One early instance where the police opted for violent suppression of a peaceful protest action involved foreign security officers of the Shah of Persia, who were allowed by the police to beat unarmed German protesters with wooden batons.[29] This ended with the controversial death of unarmed student protester Benno Ohnesorg, which was a major cause of the escalation of violent student protests during 1968. Another example of enduring deep-seated authoritarianism in German society was the reactionary anger and hatred experienced on the streets by peaceful protestors,

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[25]See, eg, Ditfurth (n 8) 222. On Meinhof's participation in the anti-nuclear war campaign see *id* 103-116.
[26]The policeman, Karl-Heinz Kurras, who shot Ohnesorg in the back of the head in the violent aftermath of an initially peaceful protest against the Shah's official reception, was charged but found not guilty. See Hausmann 'Der Tag, an dem Benno Ohnesorg starb' (2007) 2 *Die Zeit Geschichte: Das Jahr der Revolte* 6; Aust (n 3) 82-84. In May 2009 it was discovered that Kurras had worked for the Stasi, the erstwhile East German secret police: Kulish 'Spy fired shot that changed West Germany' *New York Times* 2009-05-26 ERLINK "http://www.nytimes.com/2009/05/27/world/europe/27germany.html?_r=1"http://www.nytimes.com /2009/05/27/world/europe/27germany.html?_r=1 (2009-09-24). Recently there are speculations that Josef Bachmann, who shot Dutschke, also worked for the Stasi. It was an open secret that the Stasi funded some of the left organisations and publications in which Dutschke, Meinhof and others were involved during the 1960s; see, eg, Ditfurth (n 8) 248-260.
[27]This line of thinking was heavily influenced by left intellectuals of the time, particularly Theodor Adorno and Herbert Marcuse. Rudi Dutschke was an admirer and close friend of Ernst Bloch. See generally Karl *Rudi Dutschke: Revolutionär ohne Revolution* (2003) 188-194. See further Rüthers (n19) 201-202.
[28]On this topic see Ditfurth (n 8)261-269; Karl (n 4) 77-90, 188-194.
[29]On this occasion see Aust (n 3) 77-82.

partly because of the open scaremongering and hate campaigns of what was perceived as authoritarian institutions, such as the Springer media concern.[30]

(c) Political space on the left had been closed down

A third theme in the escalation of postwar student protest in Germany was that contemporary mainstream political developments were perceived to have removed the only parliamentary space within which the left felt that they could voice their political opposition to government decisions and actions. When Kurt Georg Kiesinger, a former member of Hitler's NSDAP party and deputy director of the radio propaganda department of the Foreign Ministry, became Chancellor in 1966 with the assistance of Willy Brandt's Social Democratic Party (SDP), the left was horrified.[31] Those on the left of the political spectrum felt that the only party with which they could relate, even with some reserve, namely the Social Democrats (SDP), had deserted them, had become politically compromised and left them no option but to resort to extra-parliamentary opposition.[32]

Together with the perceived persistence of authoritarian institutions and attitudes in postwar society and the continued presence and influence of persons whose position and participation in the war had supposedly not been uncovered or dealt with adequately, this third factor, namely closure of political space on the left, apparently confirmed the perception of left intellectuals, radicals and critics that the hegemony of pre-war authoritarianism had not been dislodged by the war and that it could not be combated effectively through parliamentary or lawful strategies or methods. What remained, so it seemed, was extra-parliamentary opposition and extralegal action.[33]

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[30]Examples of the reaction that student protest received are the shouting of slogans like 'This would not have happened under Hitler!' and 'Hitler forgot to gas you!' at protesting students. In much the same vein the press reported an incident where eggs had been thrown at the American embassy as 'This is terrorism!' On the anti-authoritarian movement see Ditfurth (n 8) 202-217.

[31]Aust (n 3) 59 refers to later RAF member Gudrun Ensslin, who said that she was shocked to see Brandt and Schiller, for whom they had campaigned, now sitting on the same government benches as former enemies Kiesinger and Strauß. The leadership of the SPD, she complained, had become prisoners of the system, where they were forced to pay political heed to economic and other background extra-parliamentary forces.

[32]Interestingly, Horn 'Left, left, left: The old, the new, and the far left' in *The spirit of '68: Rebellion in Western Europe and North America, 1956-1976* (2007) 131-177 151 describes a practically identical process in Italian politics. In a wicked ironic turn, the formation of another so-called large coalition in Germany (*Große Koalition*, referring to a coalition between the two largest political parties, the conservative CDU/CSU and the social-democratic SDP) robbed Otto Schily, former legal representative of some of the RAF detainees and subsequently Minister of the Interior in the SPD cabinet of Gerhard Schröder, of the post as Minister of Foreign Affairs in the coalition government of new Chancellor Angela Merkel. On 2005-10-10, the leaders of the German Social Democrats (SPD) and Christian Democrats (CSU) agreed to create a large coalition. The SPD was expected to appoint Otto Schily as Minister of Foreign Affairs, but when it appointed Frank-Walter Steinmeier, Schily left parliamentary politics: see http://www.dw-world.de/dw/article/0,,1739934,00.html (2009-09-03).

[33]These developments are covered, together with the aftermath of the violent German Autumn of 1977, in the recently released feature film *The Baader-Meinhoff-Komplex*, directed by U Edel (2008),

2 Pretoria, June 1964

On 12 June 1964, at the end of the Rivonia trial, Nelson Mandela received a sentence of life imprisonment for sabotage and was imprisoned on Robben Island, together with Walter Sisulu, Ahmed Kathrada, Govan Mbeki, Raymond Mhlaba, Elias Matsoaledi and Andrew Mlangeni.[34] The trial and the imprisonment of Mandela and others on Robben Island represented a serious setback for the liberation struggle against apartheid, but at the same time it signified the determination of protesters and activists against the apartheid regime. During Mandela's famous statement from the dock[35] he explained the reasons for the formation of *Umkhonto we Sizwe*.[36] Firstly, the decision to form this unit and to engage in armed struggle was not taken lightly. It was taken, Mandela explained, 'as a result of a calm and sober assessment of the political situation that had arisen after many years of tyranny, exploitation, and oppression of my people by the Whites'. The struggle for 'a democratic and free society in which all persons live together in harmony and with equal opportunities', Mandela stated, was an ideal which he hoped to live for and to achieve. 'But', he concluded, 'if needs be, it is an ideal for which I am prepared to die.' The decision to engage in armed struggle was taken only because it had become inevitable:

> Firstly, we believed that as a result of Government policy, violence by the African people had become inevitable, and that unless responsible leadership was given to canalize and control the feelings of our people, there would be outbreaks of terrorism which would produce an intensity of bitterness and hostility between the various races of this country which is not produced even by war. Secondly, we felt that without violence there would be no way open to the African people to succeed in their struggle against the principle of white supremacy. All lawful modes of

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[34]See Joffe *The State vs Nelson Mandela: The trial that changed South Africa* (2007). Mandela's own version of the trial is set out in Mandela (n 15) 297-364.

[35]Mandela famously preferred to make this statement from the dock at the beginning of the defence case on 1964-04-20, instead of testifying from the witness stand. See the full statement at http://www.anc.org.za/ancdocs/history/rivonia.html (2009-09-17).

[36]'Spear of the Nation', also known as MK, military wing of the African National Congress (ANC), was formed to engage in armed struggle against the apartheid state. It committed its first act of sabotage against government installations on 1961-12-16, when government buildings in Johannesburg, Port Elizabeth and Durban were attacked. Mandela explained in the statement that the organisation had decided in favour of politically controlled sabotage, as opposed to guerrilla warfare, terrorism and open revolution, combined with organised mass action. The fact that Mandela was specifically justifying the recent turn of the ANC to violent protest illustrates the similarities and disparities between the positions of the German student movement and the ANC respectively, see (n 23). Although both were justifying their respective decisions to turn to violent protest, the students were protesting about lingering effects of a past that was largely over; the ANC were fighting against apartheid during its heyday. The German student uprising and the violence of the years between 1968 and 1977 also had an effect in that some political and social space was opened in German society, but the ANC had to wait more than 25 years (with Mandela in prison) for change. The existence of previous injustices and inequalities and the closing down of political space continued for a long time even after Mandela's imprisonment.

> expressing opposition to this principle had been closed by legislation, and we were placed in a position in which we had either to accept a permanent state of inferiority, or to defy the Government. We chose to defy the law. We first broke the law in a way which avoided any recourse to violence; when this form was legislated against, and then the Government resorted to a show of force to crush opposition to its policies, only then did we decide to answer violence with violence.

Mandela's statement from the dock is a rich document that cannot be reduced to a few generalised formulas. However, he explained and justified the anguished and considered decision to engage in armed struggle against apartheid in terms that reflect three by now familiar themes. Once again, I reiterate that Mandela's analysis of oppression in apartheid South Africa of the 1960s cannot be equated with Meinhof's or Dutschke's analysis of oppression in postwar Germany of the 1960s, but the German analysis creates an interesting analytical framework within which Mandela's famous statement provides a link to the work of Albie Sachs.

(a) Injustices of the past have not been dealt with

On the one hand, Mandela emphasised that the racial injustices of the past had not been dealt with, and clearly would not be dealt with, by the apartheid government. In this respect Mandela referred to the vain efforts of the ANC, since its establishment in 1912, to engage in political negotiations with successive white governments to improve the situation of black people. Instead of improvement, Mandela noted with his predecessor and Nobel laureate Chief Albert Luthuli, the rights of black people had been reduced even further and their situation had become worse than ever. Mandela referred to the Defiance Campaign and other efforts to change the situation through peaceful means, only to be met with increasing aggression and violent repression. Finally, he referred to the Sharpeville shooting of 21 March 1960, the subsequent declaration of a state of emergency and the banning of the ANC. All of these actions show how the state, instead of recognising and doing something about the injustices of past oppression, resorted to escalating violence to suppress any attempt to have these injustices debated or rectified.

(b) Old social inequalities still exist

The struggle against apartheid was justified, Mandela argued, not only because the racial inequalities established under the white government forced black people to continue to live in overcrowded conditions, desperately poor, with inadequate health care and housing, but also by the fact that state policies and laws were designed to preserve the situation by preventing access to the two avenues to self-improvement, namely, formal education and skilled work. Both these avenues, Mandela pointed out, were 'deliberately curtailed by legislation'. Moreover, in addition to keeping black people poor, the oppressive laws denied their humanity

and dignity: 'The lack of human dignity experienced by Africans is the direct result of the policy of white supremacy. White supremacy implies black inferiority. Legislation designed to preserve white supremacy entrenches this notion.'

Mandela's argument finds support in an overview of legislation adopted at the time. Even the briefest glance shows how the white minority government in South Africa was entrenching apartheid during the 1960s and 1970s. Significant social legislation was adopted or expanded upon during this period to entrench white privilege and ensure the exclusion of black people. Examples include legislation to further promote the establishment of separate residential areas for the different race groups,[37] to amplify the existing prohibition of racially mixed marriages[38] and to entrench the privileged white access to formal education[39] and skilled labour.[40] The apartheid government was vigorously upholding and further securing the social hierarchies of racial segregation and inequality.

(c) Political space on the left had been closed down

Mandela pointed out how black people and the ANC have tried repeatedly, over a long time, to bring the injustice of their situation to the notice of the white government and to convince the government to change. However, instead of listening to their pleas and of engaging in negotiations, every protest was met with ever increasing violence and oppression.

Again, an overview of legislation supports Mandela's conclusion that the laws enacted before or in this time secured the supremacy and inviolability of white political power and closed down any prospect of effective black political action. Firstly, legislation entrenched the racial divide between white and black politics. Important political legislation adopted during the 1960s and 1970s included laws to deprive black persons from political and social rights in the white areas by requiring all black persons to become citizens of a self-governing territorial authority,[41] while

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[37]Group areas were first formalised in the Group Areas Act 41 of 1950. This Act was repealed by s 44 of the Group Areas Act 77 of 1957, which was repealed by s 49 of the Group Areas Act 36 of 1966. See Schoombee 'Group areas legislation – the political control of ownership and occupation of land' (1985) *Acta Jurudica* (also published as Bennett *et al Land ownership: Changing concepts* (1986) 77-118 77-84. The 1966 Act, and with it the institution of separate group areas, was eventually repealed by s 48 of the Abolition of Racially Based Land Measures Act 108 of 1991.

[38]The Prohibition of Mixed Marriages Amendment Act 21 of 1968 complemented the Prohibition of Mixed Marriages Act 55 of 1949 by invalidating any marriage entered into outside South Africa between a male citizen and a woman of another racial group. See Dugard *Human rights and the South African legal order* (1978) 69. The main Act was repealed by s 7 of the Immorality and Prohibition of Mixed Marriages Amendment Act 72 of 1985.

[39]See eg, the Coloured Persons Education Act 47 of 1963; Indians Education Act 61 of 1965; Extension of University Education Amendment Act 67 of 1963.

[40]See eg, the Black Labour Act 67 of 1964; Industrial Conciliation Further Amendment Act 61 of 1966.

[41]The Bantu Homelands Citizenship Act (later renamed the National States Citizenship Act) 26 of 1970 forced black people, on the basis of residence in designated 'homelands' areas, to be citizens of those homelands and denied them South African nationality, the right to work in South Africa and the right of permanent residence in South Africa. When the Act was adopted Minister of Information and Plural

relegating so-called coloured[42] and Indian[43] citizens to 'their own' separate but clearly unequal political structures. In addition, the Prohibition of Political Interference Act 51 of 1968[44] prohibited the formation of non-racial or multi-racial political parties and foreign financing of political parties. Secondly, to ensure the state's white perception of political stability a number of security laws were enacted to allow for detention of so-called 'terrorists' without trial,[45] while the Communist Party and related political activities were prohibited.[46] There can be no doubt that this legislation effectively closed down all avenues of left or anti-apartheid political engagement and activity.

Relations and Development Connie Mulder stated: 'No black person will eventually qualify in terms of section 10 because they will all be aliens, and as such, will only be able to occupy the houses bequeathed to them by their fathers, in the urban areas, by special permission of the Minister': see http://www.sahistory.org.za/pages/chronology/special-chrono/governance /apartheid-legislation.html (2009-09-07). The Act was repealed by Schedule 7 of the Constitution of the Republic of South Africa Act 200 of 1993.

[42]The Separate Representation of Voters Amendment Act 50 of 1968 created the Coloured Persons Representative Council with forty elected members and twenty nominated members. It had legislative powers to make laws affecting coloureds on finance, local government, education, community welfare and pensions, rural settlements and agriculture. No bill could be introduced without the approval of the Minister of Coloured Relations, nor could a bill be passed without the approval of the white cabinet. See Dugard (n 38) 98. The Act was repealed by s 101(1) of the Republic of South Africa Constitution Act 110 of 1983 (the so-called 'tricameral parliament act').

[43]The South African Indian Council Act 31 of 1968 established the Council consisting of twenty-five members appointed by the Minister of Indian Affairs. The number was increased to thirty members, of which fifteen were appointed by the Minister and fifteen indirectly through electoral colleges in the provinces. Unlike the Coloured Persons Representative Council, the South African Indian Council was not granted any legislative powers. See Dugard (n 38) 100. The Act was repealed by s 23 of the Republic of South Africa Constitution Act 110 of 1983 (the so-called 'tricameral parliament act').

[44]The Act was later renamed the Prohibition of Foreign Financing of Political Parties Act 51 of 1968 by the 1985 Constitutional Affairs Amendment Act. Sections 1 and 2, relating to the ban on non-racial political parties, were repealed by the same Act. The whole Act was repealed by the Abolition of Restrictions on Free Political Activity Act 206 of 1993.

[45]The General Law Amendment Act 62 of 1966 s 22(1) provided for the detention of suspected 'terrorists' for up to fourteen days for purposes of interrogation. The Commissioner of Police could apply to a judge to have the detention order renewed. This was essentially a forerunner of the Terrorism Act 83 of 1967, which authorised indefinite detention without trial on the authority of a policeman of or above the rank of lieutenant colonel. The definition of terrorism was very broad and included most criminal acts. No time limit was specified for detention; it could be continued until detainees had satisfactorily replied to all questions or no useful purpose would be served by continued detention. Fortnightly visits by magistrates were provided for 'if circumstances permit'. No other visitors were permitted. It differed from the ninety-day and 180-day detention laws in that the public was not entitled to information relating to the identity and number of people detained under the Terrorism Act. The Act was operative retrospectively to 27 June 1962. See J Dugard (n 38) 118. Sections 3-6 and 22 of the Terrorism Act were repealed by the Internal Security Act 74 of 1982; all remaining sections except s 7 were repealed by s 33 of the Internal Security and Intimidation Amendment Act 138 of 1991.

[46]The Suppression of Communism Amendment Act 24 of 1967 prohibited certain persons from making or receiving donations for the benefit of certain organisations; prohibited others from practising as advocates, attorneys, notaries and conveyancers, and extended the grounds for deporting people from the Republic. The main Act was repealed by s 73 of the Internal Security Act 74 of 1982, which was in turn repealed by s 27 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004.

3 Johannesburg, October 2004

On 1 October 2004, Constitutional Court judge Albie Sachs delivered the Court's unanimous judgment in *Port Elizabeth Municipality v Various Occupiers*.[47] The facts in *PE Municipality* illustrate one of the major problems in South African law, namely the forced removal of homeless people who unlawfully occupy self-built shacks on vacant privately-owned land. In the High Court the municipality had obtained a court order for the eviction of the 68 unlawful occupiers, who had been occupying 29 shacks on the land for periods varying from 2 to 8 years. The Supreme Court of Appeal set the eviction order aside on appeal and the municipality applied for leave to appeal to the Constitutional Court.

The unlawful occupiers, who had not applied for housing under the municipality's housing development programme, indicated that they were willing to vacate the land if alternative accommodation was provided for them, but they rejected the alternative land offered to them because it was said to be situated in a crime-ridden and overcrowded area and because their tenure of the land would again be insecure. Apart from confirmation of the original eviction order, the municipality wanted a court order to confirm that it was not obliged to provide alternative land or accommodation to the unlawful occupiers. The municipality acknowledged its constitutional obligation to provide housing but argued that it had complied with that obligation by developing and implementing its housing development programme; to accommodate this group of unlawful occupiers, who had not even applied for housing, would disrupt the housing programme and encourage queue-jumping and strengthen the impression of preferential treatment.[48]

Sachs J dismissed the application for leave to appeal, holding that in this case it would not be just and equitable, as meant in section 26(3) of the Constitution and in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), to order the eviction of the occupiers. The main reasons for his finding were the lengthy period for which the occupiers had been occupying the land, the lack of evidence to indicate that either the municipality or the private owners needed to evict the occupiers in order to put the land to a productive use, the absence of any significant attempts by the municipality to listen to and consider the problems of this particular group of occupiers and the fact that the occupiers were a relatively small group of people who appeared to be genuinely homeless and in need.[49] In the

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[47]2005 1 SA 217 (CC). On this decision see further Van der Walt *Constitutional property law* (2005) 331-333, 424-427. In what follows I focus largely on this decision, although I refer to some of the other decisions that Sachs J wrote either for the Constitutional Court or separately, both dissenting and concurring. I do not pretend to cover all or even the most significant decisions by Sachs J and cite a more or less random list of examples that illustrate my argument. From the programme it is clear that other contributors will fill in the gaps.

[48]On the notion of a housing queue and its implications for the state's housing obligations under s 26 see *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) paras 24, 38-46, and particularly 65.

[49]Paragraph 59.

following paragraphs I highlight three themes that Sachs J raised in setting out and justifying this decision.

(a) Engage actively with rectification of past injustices

The first theme emerging from the *PE Municipality* judgment is that post-apartheid law (and by implication politics) can hope to deliver on the transformative promises of the new constitutional dispensation only if and in so far as it manages not to forget the past and to actively engage with the rectification of injustices of the past.[50] In order not to forget the past, the judgment in *PE Municipality* engages in an eight page analysis of the constitutional and statutory context of the case.[51] On the surface, this merely echoes the Constitutional Court's well-developed strategy of purposive and contextual interpretation,[52] but Sachs J quickly indicated that he has something more in mind. Rather surprisingly, the contextual analysis starts off with a discussion of the Prevention of Illegal Squatting Act 52 of 1951 (PISA), the precursor of the current Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). Together with the infamous Black Land Act 27 of 1913, the Development Trust and Land Act 18 of 1936 and the Group Areas Act 36 of 1966, PISA could probably be regarded as the pillars of discriminatory apartheid land law.[53] PISA, Sachs J reminds us, 'was an integral part of a cluster of statutes that gave a legal/administrative *imprimatur* to the usurpation and forced removal of black people from land and compelled them to live in racially segregated locations';[54] a cluster of laws that would have rendered 'the response of the law to a situation like the present [unlawful occupation of privately-owned land] simple and drastic'.[55] Under PISA, the fact that people may have been born on the land or may have resided there for a long time or had nowhere else to live would have been irrelevant. The course of justice would have been swift and simple: proof of the applicant's (or private) ownership and that the occupiers were on the land unlawfully would have been followed inexorably by criminal conviction and eviction.

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[50]Compare *City Council of Pretoria v Walker* 1998 2 SA 363 (CC) paras 102-104, 107, 132-136; *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC) paras 145-154; *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC) paras 4, 50-62, 71-74, 94-95, where Sachs J also set out the historical context before deciding the issues.

[51]Paragraphs 8-23.

[52]See *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) paras 16-17 on purposive interpretation; *Government of the Republic of South Africa v Grootboom* (n 48) on contextual interpretation. See further Du Plessis 'State law and interpretation' in Joubert, Faris and Harms (eds) (2005) 25 *LAWSA* 297-302 paras 310 (contextual interpretation) and 311 (purposive interpretation); De Ville and Du Plessis 'Bill of Rights interpretation in the South African context (2): Prognostic observations' (1993) 4 *Stell LR* 199-218 213-214 (contextual interpretation); Du Plessis 'The South African Constitution as memory and promise' (2000) 11 *Stell LR* 385-394.

[53]See Van der Walt 'Towards the development of post-*apartheid* land law: An exploratory survey' (1990) 23 *De Jure* 1-45 for an overview.

[54]Paragraph 9.

[55]*Id* para 8.

In his historical contextualisation, Sachs J reminds the Court and the parties of four related characteristics of the process of institutionalised racial discrimination.[56] Firstly, the discriminatory foundation of the institutionalised power of eviction and forced removal embodied in PISA is the direct and intended product of political ideology, namely apartheid policy. Secondly, this policy and its legal mechanics acquired the false air of legal neutrality, objectivity and impartiality because of its ostensible justification in the purpose of protecting privately-owned land from infringement through unlawful occupation. Thirdly, within the web of statutory measures that enforced and entrenched racially based spatial segregation and control over urbanisation, PISA directly contributed to the creation and solidification of the racial and social disparities in wealth, personal security and power symbolised by the 'large, well-established and affluent white urban areas co-existing, side-by-side, with crammed pockets of impoverished and insecure black ones'.[57] And, finally, this web of racial prejudice and oppression of which PISA was a central pillar was 'a source of grave assaults on the dignity of black people'.[58]

Let us not forget the past, Sachs J declared with this historical excursus on PISA, because '[i]t was against this background, and to deal with these injustices, that section 26(3) of the Constitution was adopted and statutory arrangements [such as PIE] made'.[59] Both section 26(3) and PIE have to be read, interpreted and applied with due regard for the historical context within which the injustices were created that they are intended to rectify and to eradicate. PIE 'was adopted with the manifest objective of overcoming the above abuses and ensuring that evictions, in future, took place in a manner consistent with the values of the new constitutional dispensation. Its provisions have to be interpreted against this background'.[60]

(b) Do not uphold hierarchies of the past or create new ones

The second theme from the *PE Municipality* judgment follows from the first. Sachs J was not content with remembering the injustices of the past; looking back is intended to simultaneously look forward in the sense that the goal was to change the lingering legacy of the past. The point of remembering past injustices is to eradicate them in terms of transformative legislation more effectively, not to just dwell on them.[61] Therefore, Sachs J argues, section 26(3) of the Constitution and

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[56]I summarise from paras 8-10.
[57]Paragraph 10, citing *Pretoria City Council v Walker* (n 50).
[58]Paragraph 10.
[59]*Ibid*.
[60]*Id* para 11.
[61]See the sensitivity with which Sachs J analyses social hierarchy in his judgments in *City Council of Pretoria v Walker* (n 50) paras 102-104, 107, 132-136; *Prince v President of the Law Society of the Cape of Good Hope* (50) paras 145-154; *Minister of Home Affairs v Fourie* (n 50) paras 4, 50-62, 71-74, 94-95.

PIE, which were both put in place explicitly to prevent a recurrence of the past injustices related to eviction and forced removals, must be interpreted and applied in a way that will overturn the past injustices on every aspect. Instead of just a vague incantation about the horrors of the past and the glories of the future,[62] Sachs J proceeds to work out in detail how the new constitutional order and new legislation have created a new 'constitutional and statutory matrix' within which eviction and forced removal have to be approached so as to avoid the mistakes of the past, rectify the injustices of apartheid land law and establish a more equitable set of land relations. The historic matrix of oppressive laws and practices is to be countered in terms of a new constitutional and statutory matrix of transformation.

PIE, Sachs J tells us, not only repealed PISA but inverted it.[63] This inversion includes a number of related aspects: squatting was decriminalised; eviction was subjected to new, constitutional and statutory requirements; the 'overlay between public and private law'[64] was reversed; and the character, tone and context of the new law was turned around just like the name, as appears from the new focus on preventing illegal eviction rather than unlawful occupation. The apartheid tendency of ostensibly reinforcing (white) common law rights by reducing (black) common law rights was reversed by 'tempering common-law remedies with strong procedural and substantive protections'.[65] Most importantly, the former ideological goal of facilitating the swift and simple removal, replacement and relocation of poor and landless black people for the sake of racial segregation was replaced by recognition that it was necessary to assist the victims of past racist policies to find homes and that, while waiting for access to new homes, these people had to be treated with dignity and respect.[66]

This reversed process has pertinent and significant implications for the interpretation and application of the relevant legislation. Whereas the apartheid process was deliberately depersonalised, abstract, taking no notice of the personal circumstances of those affected by eviction or of the effect that dislocation has on them, the post-apartheid process entitles them to dignified and personalised treatment that takes special notice of their personal, family and community circumstances.[67] This does not mean that people cannot be evicted, even if they have nowhere else to go – the Court emphasised that eviction remains possible,[68] but the new constitutional and statutory matrix requires that they be treated with the

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[62]Which I have described elsewhere as a one-dimensional interpretation of transformation: Van der Walt 'Dancing with codes – protecting, developing, limiting and deconstructing property rights in the constitutional state' (2001) 118 *SALJ* 258-311. Du Plessis (n 52) 385-394 sets out another richer way of dealing with memory.

[63]Paragraph 12.

[64]Referring to the way in which eviction was criminalised and rendered a purely public law matter in apartheid land law, even when it dealt with occupation of privately-owned land; see paras 8, 10.

[65]Paragraph 12.

[66]*Ibid*.

[67]*Id* para 13.

[68]*Id* para 21.

necessary fairness, dignity and respect and that the state should take seriously its obligation to help them overcome the lingering effects of the inequities they were burdened with under apartheid. Although 'compassion is built into its very structure', PIE is not 'just a means of promoting judicial philanthropy in favour of the poor'.[69]

One thing that becomes clear from this contextual analysis is that PIE cannot, as some have claimed, be regarded as 'a legislative mechanism designed to restore [white] common-law property rights by freeing them of racist and authoritarian provisions'.[70] Post-apartheid eviction law can therefore not function as a politically more savoury and legitimate tool, cleansed of its overt racist surface, for protecting the pre-constitutional superiority and inviolability of existing property holdings. However, given the fact that apartheid discrimination has robbed black people of access to property in the past, post-apartheid eviction law cannot simply undermine property rights either. In the post-apartheid dispensation it is important that property be fully respected, both by the state and by private persons, while appreciating 'the need for the orderly opening-up or restoration of secure property rights for those denied access to or deprived of them in the past'.[71] In the context of post-apartheid restoration, the respect for persons' homes that section 26 of the Constitution demands is particularly important, for the sake of the dignity of the poor and of society.[72]

Accordingly, in what I regard as one of the central passages in our post-apartheid jurisprudence, Sachs J argued that much of the case in *PE Municipality* turned on 'establishing an appropriate constitutional relationship between section 25, dealing with property rights, and section 26, concerned with housing rights'.[73] The Constitution recognises that these rights are 'closely intertwined' and section 25, far from just securing strong existing property holdings, seeks 'to strengthen the precarious position of people living in informal settlements' on the basis that stronger property rights will promote the prospect of a secure home. The seemingly contradictory provisions of section 25 and section 26 must be read in a way that finds the strength in both: the Constitution supports and authorises land reform, but does not automatically transfer title to the poor, nor does it sanction arbitrary seizure of land; it protects existing property rights against infringement, but does not allow the landowner to enforce her rights blindly and arbitrarily; it protects peoples' security in their homes, but allows for eviction to be properly carried out in certain cases.[74] Above all, Sachs J emphasises, section 26(3) requires that the courts and the parties should 'seek concrete and case-specific solutions to the difficult problems' arising from

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[69] *Id* para 14.
[70] *Ibid*.
[71] Paragraph 15, citing (in para 16) *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Fina*nce 2002 4 SA 768 (CC).
[72] Paragraphs 17-18. See also the minority judgment of Sachs J in *Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes (Centre on Housing Rights and Evictions and Community Law Centre, University of the Western Cape, amici curiae)* 2009 9 BCLR 847 (CC) paras 387, 406.
[73] Paragraph 19.
[74] *Id* paras 20-21.

eviction conflicts.[75] The impersonal, seemingly neutral but eventually inhuman eviction law of the apartheid era has been replaced by a process that explicitly takes due notice of the personal so as to be able to treat people with respect and dignity.

In an essential passage, Sachs J set out the full implications of the approach that he had developed in the earlier parts of the judgment. It is worth quoting the whole paragraph:[76]

> In sum, the Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law. It counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home. The expectations that ordinarily go with title could clash head-on with the genuine despair of people in dire need of accommodation. The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or *vice versa.* Rather, it is to balance out and reconcile the opposed claims in as just a manner as possible, taking account of all the interests involved and the specific factors relevant in each particular case.

In other words, the 'defined and carefully calibrated constitutional matrix'[77] within which eviction law now functions requires that the courts should not uphold the old hierarchies of ownership and weak occupation rights, nor should they establish new hierarchies – instead, an appropriate balance has to be established that takes account of all the interests involved and of the specific factors in each individual case.[78] In view of this general assessment of the new statutory and constitutional context, Sachs J set out the structure of PIE,[79] considered the circumstances that should be taken into account before deciding whether an eviction order is just and equitable in a specific case,[80] and concludes that such an

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[75] *Id* para 22.
[76] *Id* para 23; references omitted.
[77] *Id* para 14.
[78] In *Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes* (n 72) para 343, Sachs J follows through on this approach by explaining how he views the lawfulness of homeless people occupying state land: 'In my opinion, the question of the lawfulness of the occupation of council land by homeless families 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 common law might have a role to play as an element of these relationships, but would not be at their core. 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' (footnotes omitted).
[79] Paragraphs 24-25.
[80] Paragraphs 26-31: the circumstances are enumerated in s 6(2) of PIE, namely the circumstances of the occupation of the land; the period of the unlawful occupation; the availability of alternative

order is not justified in this particular case, taking into consideration the circumstances mentioned above.[81] In addition, the Court expressed its displeasure with the fact that no effort has been made to mediate the conflict in this case and set out the importance of and the need for mediation.[82]

(c) Resist the hegemony of sameness and leave space for difference

The third theme from the *PE Municipality* judgment is one that would perhaps be associated more strongly with other judgments of Sachs J or other aspects of his work in general,[83] but his passion for the value and dignity of difference is present in this decision as well. On one level, this appears from the meticulous way in which Sachs J ensures that the constitutional values of human dignity, contradictory values and personal embodiment of individuals are respected in the eviction process,[84] instead of the dehumanising, impersonal approach followed under apartheid eviction law.

On another level, the Court's insistence upon mediation (and later 'meaningful engagement')[85] in eviction cases can also be seen as a result of Sachs J's concern for individual embodiment, for the different circumstances, positions and needs of

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accommodation. As it is pointed out in para 30, this is an open-ended list.

[81]Paragraphs 33-38, 59. The circumstances that the Court found decisive were the lengthy period that the occupiers had been on the land, the lack of evidence to indicate that either the municipality or the private owners needed to evict the occupiers in order to put the land to a productive use, the absence of any significant attempts by the municipality to listen to and consider the problems of this particular group of occupiers and the fact that the occupiers were a relatively small group of people who appeared to be genuinely homeless and in need.

[82]Paragraphs 39-47. This aspect of the decision had an important after effect in the subsequent eviction cases of *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) and *Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes* (n 72). In *Olivia Road* the Constitutional Court insisted that there should be 'meaningful engagement' between the state and occupiers to be evicted before an eviction order could be considered; in *Joe Slovo* it has become a central part of the court order that the terms of the removal be negotiated between the parties.

[83]One of the strongest expressions is the minority judgment of Sachs J in *Prince v President of the Law Society of the Cape of Good Hope* (n 50) paras 145-147, where Sachs J pointed out the vulnerability of the Rastafari as a minority group and the historical intolerance this group had been subjected to in the past. In para 149 he justifies his dissenting judgment by pointing out that 'the real difference between the majority judgment and that of Ngcobo J [with which he agreed in general] relates to how much trouble each feels it is appropriate to expect the state to go to in order to accommodate the religious convictions and practices of what in this case is a rather small and not very popular religious community'. In paras 151-154 Sachs J characteristically sets out the social context within which the issue has to be decided. In *Minister of Home Affairs v Fourie* (n 50) paras 50-62 Sachs J developed a particularly powerful analysis of the right to be different and the value of diversity.

[84]This appears throughout the judgment, but an interesting facet appears in the reference to the careful adjudication of contradictory values in the German Federal Constitutional Court's second abortion decision of 1993; see Sachs J at para 38. (The full reference to the German case is 88 *BVerfGE* 88, 203 [1993].)

[85]See (n 81).

individual persons and communities. Sameness is a dehumanising abstraction that causes injustice, while the hallmark of a transformative legal system is that it has due regard for difference and individuality as far as is practicable. Sachs J has also demonstrated his concern for difference and dissent in the alternative, unfamiliar and decidedly untraditional and unsettling rhetoric and logical strategies that he sometimes employs in his judgments,[86] just as he did with his focus on art, architecture and narrative in the building and functioning of the Constitutional Court.[87] Time and space prevent me from engaging with these aspects of his work in any detail.

4 Pretoria, October 2009

> There is only one kind of vengeance that can assuage the loss of my arm, and that is a historical one: victory for what we have been fighting for, the triumph of our ideals .... we were accomplishing our goal of living in a free, non-racial, and democratic country. .... This ... was our soft vengeance.[88]

When members of the RAF learned on 18 October 1977 that the hijacked plane 'Landshut' had been liberated by an elite unit of the German military police while standing at the airport in Mogadishu, they reacted with violence that was perhaps typical of the reign of terror that they had been conducting over the preceding years. In the Stammheim maximum security prison near Stuttgart, RAF members Andreas Baader, Gudrun Ensslin and Jan-Carl Raspe committed suicide; Irmgard Möller survived several apparently self-inflicted stab wounds. On the same day, Hanns Martin Schleyer was killed by his RAF kidnappers.[89] Just like the day, on 2 June 1967, when the initially peaceful protests against the state reception of the Shah of Persia were violently suppressed, ending in the death of Benno Ohnesorg, violence unleashed yet more violence.[90]

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[86]Most recently, in his minority judgment in *Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes* (n 72) para 331, Sachs J again stated that '[t]his is not a matter in which formal legal logic alone can solve the conundrum of how to do justice to the one side without imposing a measure of injustice on the other'. Referring to his judgment in *PE Municipality* paras 33 and 38, Sachs J stated in par 332 that it was necessary 'not to seek an unattainable solution that is "correct", but to aim for an outcome that, in keeping with the objectives and spirit of the Constitution and relevant statutory provisions, seeks to reconcile the competing considerations and to minimise as far as is reasonably possible any resultant injustice or disadvantage to either party'.

[87]On this aspect see, eg, Le Roux 'Bridges, clearings and labyrinths: The architectural framing of post-apartheid constitutionalism' (2004) 19 *SAPR/PL* 629-665; Le Roux 'From acropolis to metropolis: The new Constitutional Court building and South African street democracy' (2001) 16 *SAPR/PL* 139-168.

[88]Sachs (n 13) 77, 222.

[89]See Aust (n 3) 826-845. Schleyer had been held hostage for 43 days by then.

[90]The *Rote Armee Fraktion* or Baader-Meinhof gang was responsible for 34 deaths during its more or less most violent ten years, between 1970 and 1980. Although many further actions were undertaken in the name of the RAF until its self-announced retirement in 1998, the movement was practically destroyed after the arrest and imprisonment in 1972 and the subsequent death in detention during the late 1970s of the first generation of RAF members. Ulrike Meinhof was found dead in her cell in Stammheim prison near Stuttgart on 1976-05-09, apparently having committed suicide. Following the

When Albie Sachs, recovering from the wounds he sustained during the unsuccessful assassination attempt, was assured by a long-time comrade and friend that the loss of his arm and his eye would be avenged, his reaction was to plead for the soft vengeance of history, the vengeance of victory for the ideal of living in a free, non-racial and democratic country. An eye for an eye, and arm for an arm, would not be justice; it would be merely personal revenge. History delivered the soft vengeance that Sachs preferred, the victory of the democracy he desired, and more, also placing Albie Sachs on the bench of the new Constitutional Court that was created to watch over and implement the Constitution of the new democracy.[91] He responded, in many judgments over 15 years, by constantly reminding us of the soft vengeance of history that made it possible for us to live in a free, non-racial and democratic country.

We cannot enjoy or sustain the soft vengeance of history if we forget the past. To maintain and develop the hard-won democracy we need to remember that millions of people died or suffered for the realisation of the ideal. We need to constantly remind ourselves of the past injustices against which we have taken vengeance, not so that we can keep the hot flush of revenge alive, but so that we can avoid making the same mistakes and so that we can be clear about what needs to be rectified in the future. We need to engage actively with the rectification of past injustices; merely reflecting upon them or hiding some of the gory details away in a dark corner will change nothing and improve nothing, but it can endanger the project of transformation.

No single lawyer has done more since 1994 than Albie Sachs to expound and clarify the transformative motto that we cannot afford to uphold the unjust and unequal hierarchies of the past or to create new ones. In his judgments he not only stated and explained this principle, he actively demonstrated what it means to dismantle and overturn or reverse hierarchy. Unless we learn how to recognise hierarchies and to see how they threaten freedom, equality and human dignity, and unless we actively dismantle and reverse them, the ideal of living in a free, non-racial and democratic country may remain just that. Law tends to construct, uphold and privilege hierarchy, often in subtle ways that have no obvious ties with or implications

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successful freeing of the 'Landshut', the plane that was hijacked in the gang's name during Lufthansa Flight 181 from Palma de Mallorca to Frankfurt on 13 October 1977 to force the German government to give in to demands of the RAF, Andreas Baader, Gudrun Enslin and Carl-Jan Raspe (also arrested in June 1972 and imprisoned in Stammheim) were found dead in their cells; the official verdict was once again suicide (see text accompanying the previous n above). Rudi Dutschke, never a member of the RAF but a leading intellectual of and spokesman for the left during the 1960s, died in 1979 from injuries sustained when he was shot in the head in an assassination attempt on April 11, 1968 (see n 4 above). Christian Klar, who headed the third generation of the RAF in the 1980s and received six life sentences in 1982 for his involvement in nine murders, including that of bank chief Jürgen Ponto, federal prosecutor Siegfried Buback and industrialist Hanns Martin Schleyer, applied for a pardon in 2007 but the application was dismissed by the German President. He was released from prison in December 2008.

[91] I am aware of the danger of the metaphor. Sachs (n 13) 210 noted that '[i]t wasn't a miracle. It didn't just come to pass. Our transition had been the most willed, thought-about, planned-for event of the late twentieth century.'

for race, gender, social standing, economic power or any of the other standard signifiers of distinction and discrimination that we have become sensitive about. Without an acute awareness of hierarchy and a sensitive eye and ear for its entrenchment of social, economic and political power, transformation remains superficial and symbolic. Those of us who are academics can honour the contribution of Sachs J to the Constitutional Court by making our students read the judgments in which he lays bare the contours of hierarchy and demonstrates its impact of the privileging of power, inequality and injustice. If anything, Albie Sachs's awareness of hierarchy and willingness to overturn it could be an indication of the critical nature that post-apartheid legal methodology needs to develop.

Sachs J also continuously exhorted and inspired us to resist the hegemony of sameness and to value and leave space for the dignity of difference. His judgments eloquently explain the value of difference, but they also demonstrate the importance of making space for uncomfortable and troublesome difference, as opposed to merely singing the praises of difference as a kind of hippy aesthetic, and they show the links between difference and dignity. And, finally, they offer strong arguments for critical difference, the kind of difference that creates discomfort and that troubles us because we have to make an effort to accommodate, instead of just enjoying or celebrating the Other.

In a democracy that openly and consciously engages with the injustices of the past, that deliberately dismantles and avoids the creation of hierarchy and that values and accommodates difference and painfully but consciously makes room for dissent, opposition and resistance, violence is unnecessary and vengeance is soft.