The strange alchemy of the judge and the blue dress

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Introduction: The judge and the blue dress

> … the people who have a little determine a little and the people who have a lot determine a lot, and the people who have nothing determine ... nothing.[1]

After being tortured, Phila Ndwande's body was found naked in a shallow grave, with a scrap of a blue plastic fashioned as a panty to cover her genitals. The artist, Judith Mason, was so moved by her story that she made a dress of blue plastic bags on which she inscribed the following text:

> Sister, a plastic bag may not be the whole armour of God, but you were wrestling with flesh and blood, and against powers, against the rulers of darkness, against spiritual wickedness in sordid places. Your weapons were your silence and a piece of rubbish. Finding that bag and wearing it until you were disinterred is such a frugal, common-sensical, house-wifey thing to do, an ordinary act ... Memorials to your courage are everywhere; they blow about in the streets and drift on the tide and cling to thorn-bushes. This dress is made from some of them.[2]

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[*]Professor of Law, Nelson Mandela Metropolitan University. This contribution is an amended version of a paper delivered at *The Constitutional Jurisprudence of Justice Albie Sachs: A Retrospective* Conference held at Unisa on 9-10 October 2009. My sincere gratitude to the organisers of this event, to Justice Albie Sachs who generously attended the entire conference, listened attentively to each paper and provided his personal feedback, and to my research assistant, Jacqueline Nereah Odundo, for her invaluable support. *Hamba Kahle* Justice Sachs.

[1]Vanessa Redgrave in *The fever* (2004) HBO.

[2]Sachs *The strange alchemy of life and law* (2009) at vii. Judith Mason's artwork, *The Blue Dress,* consists of two large paintings and a pretty, summery dress made by the artist from pieces of blue plastic. Each painting shows the dress floating free through a dark and threatening landscape where scavenging hyenas lurk, waiting for death, but the dress remains out of their reach. Mason's work was inspired by the story of Phila Ndwande, an activist detained under *apartheid* law. The police stripped her and put her in a cell. In an attempt to protect her privacy, she fashioned a pair of panties from a blue plastic supermarket bag. One of her captors told the TRC years later that '[s]he was brave this one, hell, she was brave. She simply would not talk'. Ndwande was shot and buried secretly, and when her grave was excavated by the TRC, all that remained was her skeleton and the tattered blue plastic panties. See http://www.constitutionalcourt.org.za/text/art/people/judith_mason.html.

In her commentary on the *The man who sang and the women who kept silent,* Mason states that it was a privilege for her to honour Ndwande, but that it also left her with 'an abiding sense of shame'.[3] Mason bore witness to and reaffirmed Ndwande's dignity with the creation of a blue dress made out of discarded plastic bags, and in so doing resisted reducing Ndwande to a mere helpless victim. In this sense, Mason's response was resoundingly *ethical* in that it represents a singular response to the uniqueness of *this* particular woman. But, she also retains a sense of guilt and shame at not being able to do justice to Ndwande's suffering. This could be seen as an illustration of the Levinasian/Derridian distinction, as described by Drucilla Cornell, between the singularity of the ethical response to suffering and the uncertainty and (im)possibility of justice, as the call to justice is a 'simple command' yet an 'infinite responsibility'.[4]

Mason herself describes her role as an artist as follows:

> I am an agnostic humanist possessed of religious curiosity who regards making artworks as akin to *alchemy*. To use inert matter on an inert surface to convey real energy and presence seems to me a magical and privileged way of living out my days.[5]

Justice Albie Sachs was so moved by Mason's gesture that he commissioned her artwork for the Constitutional Court, where it now hangs as a reminder of our recent past.[6] In his book *The strange alchemy of life and law,*[7] Sachs includes a photograph of the blue dress. The prologue to the book is written by Mason, where she comments on the stories that led to her creations. Her use of the word 'alchemy' provides an indication of her yearning to transform the mundane – *'a frugal, common-sensical, house-wifey thing to do, an ordinary act'* – into the magical, as the alchemic process (a form of sorcery) is essentially one of 'transforming something common into something special'.[8] Something that Sachs also seems to believe: that life magically transforms the law into something other than a rule-based machine.[9] However, it has been argued that '[t]hose of the chemical craft know well that no change can be effected in the different species of substances, though they can produce the *appearance of such change'*.[10] As Drucilla Cornell has argued, we will always fail in our attempts at dressing up law in the garments of justice, as we can never successfully mask the foundational violence

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[3]Sachs (n 2) viii.
[4]Cornell *The philosophy of the limit* (1992) 154.
[5]Mason (2004). See http://www.artprintsa.com/judith-mason.html (my emphasis).
[6]Upon Sachs's request to make the collection 'softer' and 'more reconciled', Mason produced another painting for the final triptych, with a row of blazing braziers in the foreground, offering warmth and hope. See http://www.judithmason.com/assemblage/5_text.html.
[7]Sachs (n 2).
[8]See below for a definition of 'alchemy'.
[9]Sachs describes himself as a creation of the 'enlightenment' (Sachs (n 2) 8) but also acknowledges that his life experiences have altered the law in 'mysterious ways' that are not unfathomable but 'difficult to define' (*ibid*).
[10]Briffault *The making of humanity* (1938) 196-197 (my emphasis).

of the law.[11] There is thus no alchemy involved – in the sense of a *transmutation from potentiality into actuality*[12] – but a mere process of masking and masquerading the broken and tortured body (of the law) under a blue plastic dress.

Against this background, I critically analyse Sachs's commentary on his role as a Constitutional Court judge in his latest book, alongside his jurisprudence on socio-economic rights as evidenced in two cases, namely *Soobramoney v Minister of Health Kwazulu-Natal*[13] and *Government of Republic of South Africa v Grootboom*.[14] In this analysis I attempt to problematise the view that we have progressed, that we have crossed our bridge and moved from a culture of authority to a culture of justification,[15] and that we can now celebrate the triumph of 'transformative constitutionalism' in post-*apartheid* legal culture.[16] After closely analysing Sachs's jurisprudence, I move in the second part of the paper to a critique of justification, focusing on a movie, *The Fever,* as well as the work of Louis Wolcher on universal human suffering[17] and Johan van der Walt on sacrifice.[18] The central question raised is whether law-doers are indeed able to respond to human suffering, and to act responsibly in the face of this suffering, in such a way that the law is alchemically transformed into something other than a tragedy.

It should be noted from the outset that I write this critique of Sachs's socio-economic jurisprudence within the context of my respect for the contributions he has made as a judge. My concern rests, however, with the fact that Sachs's pre-bench political activism did not (fully) translate into judicial activism, but rather tended towards a utopian yet *cautionary* approach[19] that failed to adequately interrogate the *status quo*.

Speaking as a Judge

al·che·my
1 a medieval chemical science and speculative philosophy aiming to achieve the

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[11]Cornell (n 4) *ibid*.
[12]See Hamed A Ead 'Alchemy in Ibn Khaldun's Muqaddimah' at www.levity.com/alchemy/islam20.html.
[13]1998 1 SA 765 (CC).
[14]2000 11 BCLR 1169 (CC).
[15]See Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *SAJHR* 31.
[16]See Klare 'Legal culture and transformative constitutionalism' (1998) *SAJHR* 146.
[17]See Wolcher *Law's task: The tragic circle of law, justice and human suffering* (2008). Much of Wolcher's thinking on human suffering is based upon Levinasian ethics, as will be apparent from the discussion below. See in general Levinas *Totality and infinity: An essay on exteriority* (1969) Lingis (trans) and *Otherwise than being or beyond essence* (1991) Lingis (trans).
[18]See Van der Walt *Law and sacrifice: Towards a post-apartheid theory of law* (2005).
[19]Klare (1998) (n 16) 171. Klare describes judicial 'caution' as '[a] reluctance to press legal materials toward the limits of their pliability, a tendency to underestimate the plasticity of the legal materials, and an exaggerated concern to give the appearance of conforming to traditional canons of interpretive fidelity' (*ibid*).

transmutation of the base metals into gold, the discovery of a universal cure for disease, and the discovery of a means of indefinitely prolonging life
2 a power or process of transforming something common into something special
3 an inexplicable or mysterious transmuting.[20]

Besides his legacy of beautifully written judgments, Justice Sachs provides us with insight into the process of judging, and his experience of being a judge, in *The strange alchemy of life and law*:

> In the beginning and the end is the word, at least as far as the life of a judge is concerned. We pronounce. We work with words, and become amongst the most influential story-tellers of our age. How we tell the story is often as important as what we say. The voice we use cannot be that of a depersonalised and divine oracle that declares solutions to the problems of human life through the enunciation of pure and detached wisdom. Nor dare we seek to imitate the artificial sound of a computer that has been programmed to produce inexorable outcomes. We speak with the living voices of real protagonists who are immersed in and affected by the very processes we deal with. If law is a machine we are the ghosts that inhabit it and give it life. We are animated by consciences that will have been shaped not only by our learning but by our varied engagements with life, with experiences both inside and outside the law.[21]

To begin at the end, Sachs concludes his book with a simple answer as to what judges do: 'in a word', they 'judge'.[22] He explains the process in the same way as it is articulated in the pages of most, if not all, Constitutional Court judgments. His (alchemical) formula for judging consists of four elements: weighing different considerations; balancing issues based on the principle of proportionality; considering constitutional values and context; and communicating reasons for the judgment to the public.[23]

But Sachs does not begin his book with quite as much certainty about his role as a judge. He begins his story with an account of some of his experiences as a freedom fighter. In the prologue to his book Sachs describes his early life as being 'divided' between 'lawyer' and 'outlaw'.[24] During this time, Sachs did not see his relationship with the law as unproblematic in the light of his activism against *apartheid* law. He thus relates the story of a lecture that he delivered at the University of Toronto, where he told students that '[e]very judgment I write is a lie'.[25] This is not as a result of the falsehood of the content of the judgment, but rather refers to the internal struggle a judge goes through when thinking through difficult concepts and then articulating these concepts as clearly as possible. Sachs then proceeds *not* to refer to the suffering, sacrifice, sorrow, uncertainty or undecidability in the moment of judgement,

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[20] http://www.merriam-webster.com/dictionary/alchemy (my emphasis). The 'philosopher's stone' that must transform (through the process of transmutation) the substance comes from the head of a serpent.
[21] Sachs (n 2) 170.
[22] *Id* 273.
[23] *Ibid*.
[24] *Id* 1-2.
[25] *Id* 7.

but rather elaborates upon the *four logics* that are involved in the process of judging, namely: discovery, justification, persuasion, and preening.[26] Another nice, neat formula that nevertheless contains moments of 'mystery' embedded in life experience.[27]

Sachs is then clearly a legal realist of sorts, admitting that Cartesian rationality only plays a small part in decision-making as it is also interspersed with elements of passion, creativity and intuition, some of which occur in interesting places such as a warm bath.[28] These bath-time revelations, according to Sachs, are some of the best-travelled of all his opinions.[29]

There is no doubt that Justice Sachs has enriched our constitutional jurisprudence substantially. But I would argue that although he has stretched our legal imaginations somewhat, he has also worked within strict constraints (within the limits of the law) that have prevented him, to some extent, from fulfilling Klare's promise of a post-liberal 'transformative constitutionalism'[30] in the sense that Karin van Marle understands it, namely, as a 'critical account of the notion [of law] itself',[31] where judges read the Constitution as being both legal and political:

> What I mean by transformative constitutionalism as critique, for the moment, is an approach to the Constitution and law in general that is committed to transforming political, social, socio-economic and legal practice in such a way that it will radically alter existing assumptions about law, politics, economics and society in general.[32]

As mentioned, Sachs's cautious approach is more particularly illustrated in his commentary on the enforceability of socio-economic rights in the *Soobramoney*[33] and *Grootboom*[34] cases that reflect his 'compassion' on the one hand, and his (possibly reluctant) acceptance of the law's role in perpetuating 'necessary' suffering on the other, without going so far as to *mourn* this fact.

Mr Soobramoney and Mrs Grootboom

> In short, for a decision to be just and responsible, it must, in its proper moment if there is one, be both regulated and without regulation: it must conserve the law and also destroy it or suspend it enough to have to reinvent it in each case, *rejustify it*, at least reinvent it in the reaffirmation and the new and free confirmation of its principle.[35]

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[26] *Id* 7-8.
[27] *Ibid*.
[28] *Id* 116.
[29] *Id* 117-119.
[30] Klare (n 16).
[31] Van Marle 'Transformative constitutionalism as/and critique' (2009) 20/2 *SLR* 286 at 293.
[32] Van Marle (n 31) 288. In a footnote Van Marle refers to Cornell's understanding of transformation as something that connotes a radical break from the system itself, as opposed to the slowness of evolution. See Cornell *Transformations* (1993).
[33] (N 13).
[34] (N 14).
[35] Derrida 'Force of law: The mystical foundation of authority' quaintance' (trans) in *Deconstruction and the possibility of justice* Cornell, Rosenfeld and Carlson (eds) (1992) 3 at 23 (my emphasis).

Let us take the specific stories of Mr Soobramoney and Mrs Grootboom to illustrate the extent to which the law and its judicial functionaries – law-doers – are (un)able to *do* justice. The Constitutional Court's version of their stories is well-known. What I wish to focus on in this contribution is how Sachs's cautious interpretation of the enforceability of socio-economic rights is a reflection of a general tendency to accept that human suffering is necessary in order to ensure the greater good.

Thiagraj Soobramoney was a 41-year-old diabetic suffering from ischaemic heart disease, cerebrovascular disease and irreversible chronic renal failure. It was common knowledge that his life could be prolonged by regular renal dialysis. He did not have sufficient resources to continue renal dialysis in a private health facility, and so he sought dialysis treatment from Addington State Hospital in Durban.[36] However, due to a shortage of resources, the hospital could only provide dialysis to a limited number of patients. The hospital therefore developed a set of guidelines to determine eligibility for the dialysis programme. Soobramoney, who suffered from other cardiac and cerebrovascular complications, was not eligible for the dialysis programme in terms of these criteria and so was denied treatment by the hospital. In July 1997 he made an urgent application to the Durban and Coast Local Division of the High Court for an order directing Addington Hospital to provide him with ongoing dialysis treatment.[37] His application was dismissed, and the matter was brought on appeal to the Constitutional Court in an attempt to enforce his right to emergency medical treatment and his right to life.[38]

In short, Soobramoney wanted to enforce his right to be kept alive by a kidney dialysis machine for as long as possible, whilst the hospital in question claimed that they were not equipped to do so as they lacked resources and had to keep many other people alive – people who were more likely to survive. The Court subsequently dismissed the claim based on these two rights, but then went further to discuss the possibilities for the success of the claim had it been brought on the basis of the section 27(1)(a), the right to access to health care services. The Court then stated that section 27(1)(a) was qualified by section 27(2), which, *inter alia*, determines that the state is only required to give effect to the section 27(1)(a) right 'within its available resources'.[39]

The Court found that the hospital had shown that it had limited resources available for the provision of kidney dialysis treatment, which did not allow it to provide the treatment to all who required it. The hospital had further shown that it had developed a set of reasonable and fair criteria that enabled it to decide who would receive the limited treatment available and who would not, and that those

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[36] *Soobramoney* (n 13) paras 1 and 5.
[37] *Id* para 5.
[38] *Id* paras 5, 7.
[39] *Id* para 22.

criteria had been applied in good faith in the instant case.[40] Stating that courts would be 'slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters',[41] the Court found that the claim would also have failed, had it been brought on the basis of section 27(1)(a).

It was therefore held by the Court that Thiagraj Soobramoney was not entitled to the kidney dialysis treatment and he died shortly thereafter.

In a commentary on his judgment in *Soobramoney,* Sachs states *inter alia* that:

> This was a most painful case. Effectively, it was up to the eleven men and women on the Court to decide whether this man lived or died. There was no precedent to guide us – all we had was the text of the Constitution, a hospital with good but limited resources, and the pleas of a dying man.[42]

The test for 'reasonableness' was used in response to the pleas of a dying man. The hospital's policy was found to be 'eminently rational and non-discriminatory' and Soobramoney's pleas were dismissed.[43] Furthermore, Sachs recalls remarking to counsel that if 'resources were co-existent with compassion, the case would have been easy to decide'.[44] The sadness, according to Sachs, is that it had already been *established* that the enforceability of socio-economic rights is dependent on the availability of resources, and as resources are limited, such rights must be rationed through a system of 'apportionment'.[45] Sachs then concludes that the aim should ideally be that the reach of health programmes should become progressively larger, and that each individual would be granted the right to be considered fairly and without discrimination for treatment within such programmes'.[46] But, the moment of judg(e)ment itself constituted the subjugation of an individual, whose death was found to be necessary in order to save the lives of others in future.

This brings us to the story of Irene Grootboom, who initially lived in Wallacedene, an informal squatter settlement in the municipal area of Oostenberg. The residents of Wallacedene lived in severe poverty, without any of the basic services of water, sewage or refuse removal.[47] The area is partly waterlogged and lies dangerously close to a main thoroughfare. Many Wallacedene residents had placed their names on a waiting list for low-income housing.[48] As time wore on, a group of about 900 people, including Irene Grootboom, began to move from Wallacedene onto adjacent, vacant, privately-owned land that had been ear-marked

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[40] *Id* para 29.
[41] *Ibid*.
[42] *Id* 174-175.
[43] *Id* 175.
[44] *Ibid*.
[45] *Id* 176.
[46] *Id* 176-177.
[47] *Grootboom* (n 14) para 7.
[48] *Id* paras 7, 8.

for low-cost housing. The private landowner obtained an eviction order and the Sheriff was ordered to dismantle and remove any structures remaining on the land.[49] The magistrate granting the order said that the community and the municipality should negotiate in order to identify alternative land for the community to occupy on a temporary or permanent basis.[50]

The evicted community now had nowhere to go. Since they had lost their former sites in Wallacedene, they moved onto the Wallacedene sports field and erected temporary structures.[51] With legal assistance, the community formally notified the municipality of the situation and demanded that the municipality meet its constitutional obligation to provide adequate temporary accommodation. Without a satisfactory response from the municipality, the community launched an urgent application in the Cape High Court.[52] The Grootboom community based their case on two constitutional provisions:

- Section 26 of the Constitution which provides that everyone has a right of access to adequate housing. It obliges the state to take reasonable measures, within its available resources, to make sure that this right is realised progressively.
- Section 28(1)(c) which provides that children have a right to shelter.

The Cape High Court rejected the first argument. It held that government's housing programme was reasonable and thus fulfilled the requirements of the Constitution.[53] In terms of the second argument, the court held that parents are primarily responsible to provide shelter for their children. If, however, they are unable to do this, section 28(1)(c) places an obligation on the state to do so.[54] Further, the court found that the parents should be able to live with their children in the shelter as it was not in the best interests of children to be separated from their families.[55]

Government took the decision of the High Court on appeal to the Constitutional Court. In the case of *Government of the Republic of South Africa v Grootboom*[56] the Court adopted a standard of review founded upon an assessment of reasonableness. At the centre of this approach lies the Court's concern with an assessment of resource availability and the fact that the realisation of socio-economic rights is a function of resource allocation over time, which effectively subjects them to a certain logic of (re)distribution. In addition, the Court also carefully located its socio-economic rights adjudication function within

[49] *Id* para 9.
[50] *Id* para 9.
[51] *Id* para 11.
[52] *Grootboom v Oostenberg Municipality* 2000 3 BCLR 277 (C).
[53] *Grootboom* (n 52) para 14.
[54] *Id* para 15.
[55] *Ibid*.
[56] *Ibid*.

its understanding of the fundamental principle of separation of powers as between the judiciary and the legislature as policy formulator and the executive as the driver of service delivery.[57]

In his commentary on the judgment in the *Grootboom* case, Sachs warns that judges should avoid the pitfalls of being 'passive and uncaring' on the one hand, and seeking 'headlines as champions of the poor' on the other.[58] In avoiding these pitfalls he endorses a process of finding a *secure jurisprudential foundation* for responding to situations.[59] So, how then did the Court respond to people sleeping with their heads in the dust under plastic sheeting?[60] It determined that the State has an obligation to take reasonable, progressive steps to provide adequate housing within their budget in order to respect the dignity of the poor. The result, as Sachs mentions much later in the epilogue of his book, was that Irene Grootboom died some years later 'without having moved from her shack to a brick house'.[61]

Within this context Sachs acknowledges the difficulty of enforcing socio-economic rights and states that '[t]he years on the Court have not always been free from moments of pain and discomfort'.[62] Largely, however, he describes his experience on the bench as 'intense, productive and joyous'.[63]

In response to the socio-economic jurisprudence of Sachs and his colleagues on the bench, Jackie Dugard maintains that the judiciary remains institutionally '*unresponsive* to the problems of the poor and it fails to advance transformative justice'.[64] Dugard notes that the Constitutional Court has adopted a cautious style, which Iain Curry – following Cass Sunstein – has termed 'judicious avoidance'.[65] In an attempt to illustrate this critique, Dugard refers to the recent case of *Olivia Road*[66] where the Court had to decide on the nature of the state's obligations towards 67 000 desperately poor people facing eviction from buildings in the inner city of Johannesburg in terms of the city's urban regeneration programme. Following the earlier judgment of Sachs in *PE Municipality,*[67] the court avoided a number of difficult issues[68] and focussed instead on establishing the requirements for a local authority

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[57]*Id* paras 21-25.
[58]Sachs (n 2) 177.
[59]*Ibid*.
[60]*Ibid*.
[61]*Id* 274.
[62]*Ibid*.
[63]*Id* 275.
[64]Dugard 'Courts and the poor in South Africa: A critique of systemic judicial failures to advance transformative justice' (2008) 24 *SAJHR* 214 at 215 (my emphasis).
[65]See Curry 'Judicious avoidance' (1999) 15 SAJHR 138, drawing on Sunstein *Legal reasoning and political conflict* (1996).
[66]*Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC); 2008 5 BCLR 475 (CC).
[67]*Port Elizabeth Municipality v Various Occupiers* 2004 12 BCLR 1268 (CC).
[68]Dugard (n 64) 237.

to 'meaningfully engage' with occupiers facing eviction. Finding that the City of Johannesburg had failed to make an effort to engage with occupiers at any time before proceedings for eviction were brought, the Court ruled that the subsequent eviction was unlawful. While a welcome innovation, Dugard submits that:

> … the concept of meaningful engagement does not provide poor people with any concrete protections against eviction, nor does it help to delineate the right to housing. … the Court failed to tackle the policies and practices at the core of the vulnerability of poor people living in locations earmarked for commercial development and it failed to establish critical rights-based safeguards for extremely vulnerable groupings, despite having all the material before it to do so.[69]

It is thus submitted in agreement with Dugard that despite the grim realities of poverty, and the urgent need to positively address these realities, the Constitutional Court has carried out its obligations with respect to socio-economic rights in a *tentative* manner[70] – an approach in deference to the sovereignty of law and state seemingly also endorsed by Sachs as argued above.

Furthermore, despite the promise of a justiciable Bill of Rights, a burgeoning economy and positive economic growth rates, post-*apartheid* South Africa remains a country in which poverty is the lived experience of vast numbers of her people. As Costas Douzinas puts it, poverty provides a good example of the underlying problem of human rights, as the poor remain trapped between abstract notions of equality and the indifference towards their substantive inequality and concrete needs.[71] As I have written elsewhere,[72] the socio-economic rights jurisprudence of the South African Constitutional Court reflects two of the failings of a neo-liberal discourse on human rights as identified by Douzinas:

1. Social, economic and cultural rights are meant to address the concrete realities of poverty, but their scope is limited because the law may try to address discrimination in general, but it cannot address the concrete realities of *this* or *that* person. In other words, human rights law can only 'accommodate' the claims of certain amorphous or generic groups or classes of people, such as the poor, the homeless, the sick, and so on.[73]
2. In addition to the inherent inability of socio-economic rights to address the real suffering of human beings, the location of rights within the confines of state sovereignty causes them to fail once more.[74]

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[69]Dugard (n 64) 238.

[70]See *inter alia* Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' (2004) *SAJHR* 383 and Davis 'Adjudicating the socio-economic rights in the South African Constitution: Towards "deference lite"' (2006) *SAJHR* 301.

[71]Douzinas *Human rights and empire: The political philosophy of cosmopolitanism* (2007) 40.

[72]Bohler-Müller 'On a cosmopolis to come' (2008) 17/4 *Social and Legal Studies: An International Journal* 559.

[73]As Douzinas points out, this universalising logic of the law necessarily fails the singularity of the self, exemplified by the 'uniqueness and unrepeatable epiphany of the face' (Douzinas (2007) (n 71) 42).

[74]Douzinas (n 71) 270.

The constrained and cautious approach(es) adopted in *Soobramoney* and *Grootboom* is thus a concrete illustration of Douzinas' problem with dominant conceptions of democracy and human rights. The socio-economic jurisprudence adopted by the Court amounts to little more than passivity in the face of suffering where, with a sympathetic shrug of their shoulders, the justices confirm that 'suffering is humanity's inescapable destiny'.[75] Despite there existing a potential for radical innovation in the interpretation of socio-economic rights by adopting a more flexible and creative judicial engagement with rights,[76] the court rather *fixes* the sovereignty of the state over the situation by subjecting all claims to the 'availability of resources'. Rather than *challenging* dominant notions of democracy, human rights and the separation of powers[77] the court clings to these truths in a restrained and tentative manner. The danger of this approach is that it may open the gate for human rights to be 'hijacked by governments that [understand] the benefits of moral-sounding policy'.[78]

The tragic circles of human suffering

The central question thus remains: can the law and law-doers do justice to the singularity of each and every person, or can it only deal in general categories that exclude the possibilities of a just response?[79] Ideally, the law should not reduce people to a faceless crowd, but must – if it is to be just – respond to every person in his or her uniqueness and must remain open to exceptions, to difference and to otherness. So, simply put, the law *cannot* be just, as it deals not with only one, but with the many, *inter alia* the 'poor', the 'vulnerable', 'women and children' and so on. Following this reasoning, Sachs was *unable* to face up to its infinite responsibility towards the peculiar suffering of Mr Soobramoney and Mrs Grootboom. This is the tragic task of law. Law-doers can merely justify their decisions *ex post facto* by differentiating between useless and necessary suffering, or just and unjust violence.

In *Useless Suffering* Levinas goes as far as to say that 'the justification of the neighbour's pain is certainly the source of all immorality'.[80] Following the footsteps of Levinas, Louis Wolcher argues that responsibility and distress arise together in the moment of justice, 'that makes the *I* pause in doubt before acting in a world swarming with many suffering Others'.[81]

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[75]Douzinas (n 71) 89.
[76]Pieterse (n 70) 411.
[77]*Id* 389.
[78]Douzinas (n 71) 33.
[79]Levinas (1969) and (1991) (n 17).
[80]Levinas quoted in Wolcher *Beyond transcendence in law and philosophy* (2005) 159.
[81]Present alongside the Other's face is the face of the third person, the fourth person, and so on. Given the fact that energy, time and resources are limited, how do we discharge our ethical duty towards a multitude of others? Each 'other' is a singular and unique person with her own demands

The problem of 'the justification of the neighbour's pain' is effectively illustrated in the movie *The Fever,* which follows the 'awakening' of an unnamed wealthy urban woman (Vanessa Redgrave) who becomes increasingly aware of the nature of politics, economic exploitation and rampant consumerism. In the movie a series of events lead her to visit an unnamed third world country where she meets a journalist (Michael Moore) who suggests a visit to the country's war-torn neighbour in order to experience a 'true picture' of life in the region. This experience undeniably marks her and she feels discomforted in the face of war and poverty. Deciding to abandon her old elitist and consumer-driven lifestyle, she subsequently subsides into a state of melancholy, questioning the moral consistency of her own life and her complicity in fuelling the consumerist machine.

Her subsequent return to this war-torn country later in the movie leads to a delirious fever in a run-down hotel, where she challenges her own desire for comfort and entitlement. She then realises that she can no longer continue to live, immersed in her personal comforts – or 'clean white sheets' as she terms them – and pretend that she is not personally responsible for the suffering and pain that she sees all around her. But she is also patently aware of her inability to respond adequately.

In a feverish conversation with herself, she attempts to rationalise and justify the fact that she does not give everything that she has to the poor. Her thoughts flow turbulently from the predictability of her privilege as a child whose parents offered her a voluptuous and fertile, yet blood soaked, land that had been stolen centuries ago by men with 'glittering knives'. As her fever progresses, she laments the curse of 'having everything' and the fact that she can never escape her connection with the poor whose existence guarantees her own. In her delirious state she argues that 'we must talk to the poor and explain to them' – in special classrooms – that they cannot have everything now, that they must *wait*. We must educate the poor and convince them that what they want is *gradual change* and not revolution. They must take what we give them in terms of our contract with them and they must understand the 'morality of waiting'. And if they do not understand this law, they must be 'taken out and shot' or have their tongues ripped out. She sets out to convince herself that ultimately '*we* decide what we will give to them – and we will not give everything'. She muses that:

> We tell the poor that soon their children will have medicine and that soon they will have homes and that they must wait patiently for this gradual change. And so the poor demand our help … and they do not go away … filling everyone with horror.

The moment then arrives when she faces the fact that she, lying beneath her clean white sheets, is personally to blame for the world being 'fundamentally not

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and thus the original ethical encounter is ruptured. There is a necessary harshness, a certain violence inherent in all attempts to do justice as one call for justice is answered whilst another call is ignored or denied. The moment of law-making thus always constitutes the moment of someone's subjugation. See Wolcher (2005) (n 80) 146-147.

just'. This realisation means that she cannot lay claim to being a decent person as this merely perpetuates the lie of blamelessness:

> Dear god, I understand … the life I lead is irredeemably unjust, it has no justification. My sympathy for the poor does not help the poor. Gradual change is not happening.

She chooses then to discard the 'exhausting lie' that she is able to change sides and give everything away. And as the fever finally breaks – the 'hour has passed … as the streets are waking' – she closes the curtains of her hotel window, with a view to the poverty and corruption in the streets below, and climbs into bed in the knowledge that she will soon return home to her own bed and all her precious possessions. But, she concedes, there among her beautiful things, 'let all those faces sit by my bed'.

In *Law's task: The tragic circle of law, justice and human suffering*[82] Louis Wolcher investigates and bears witness – much in the same way as the wealthy woman in *The Fever* – to the task and spirit of law in the face of human suffering, and explores the fact that law and justice are intimately connected to the historical production and reproduction of universal human suffering:[83]

> Precisely because it is necessary for justice to be done, it is also tragic when it is done, for one person's justice almost always leads to someone else's subjugation and pain.[84]

In exploring this theme, he explains the important differences between compassion and ethical distress as responses to suffering. We feel c*ompassion* when we are deeply touched by someone's suffering. This is a burden that we choose to carry as we suffer-with-the-sufferer, a response which goes beyond altruism and pity.[85] For Wolcher, then, 'compassionate law' is impossible, as compassion can only apply to a unique individual and cannot be universalised. The passion of compassion therefore allows no abstraction and cannot be generalised.[86] *Ethical distress,* on the other hand, is not a sentiment, as is compassion, but is rather a *receptivity* to universal suffering:

> The sensibility of ethical distress, on the other hand, remains purely receptive at all times. Never reliably leading anywhere in particular, it is an uncovered wound, always quivering and ready to throb if touched.[87]

Ethical distress is felt, as in *The Fever*, when we are faced with many suffering others. Ethical distress then seeks to make possible the impossible and to generalise the specificity of compassion.[88] For this reason ethical distress

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[82] Wolcher (2008) (n 17).
[83] *Id* 5.
[84] *Id* 14.
[85] *Id* 67. See also Arendt *On revolution* (2006) (2nd ed) 75.
[86] *Id* 68.
[87] *Id* 71.
[88] *Id* 76.

disturbs and irritates. And it leaves no place for certainty as '[e]thical distress … is like a blazing sun at high noon: it pitilessly illuminates the entire landscape of human suffering and responsibility, leaving nothing in the shade'.[89]

According to Wolcher, the problem is that the law fails to internalise and acknowledge the tragedy of human suffering that is pitilessly illuminated by ethical distress. For this reason, Wolcher argues, legal justification also remains problematic as it tends to posit *some forms of suffering* – some sacrifices – as inevitable, necessary and just. For Wolcher, justifications of this sort act like 'powerful narcotics' numbing feelings of responsibility for *all* forms of suffering.

Wolcher's main thesis is that the origin of law is not violence, but human suffering.[90] Violence is merely the way law *manages* human suffering that is at once the 'necessary condition of law's existence and the ineluctable product of its operations':[91]

> It seems to me that law-doers, like garbage collectors, take it upon themselves to do a kind of dirty work. Among other things, this means that the moment they begin to think of themselves as lofty and venerable priests of a meaning body – they are lost. For in that very moment they start forgetting that they alone are the agents of law's appearance. Those who bend their necks to the yoke of the law in this way lose the capacity to become what the spirit of law's task demands of them … the spirit of law's task does not demand that law-doers become the faithful servants of law and justice. On the other hand, neither does that spirit require them to defy or subvert what they believe law and justice require of them.[92]

So what does the spirit of Wolcher's law require? It requires that law-doers acknowledge that they are participants in the tragic making of a world, and that this is never more than a *mixed blessing* for those who must live in this world.[93] For Wolcher, words of justification cannot provide comfort or relieve suffering. Johan van der Walt argues, along different lines, that law's task is for law-doers to recognise that for every right upheld or granted another must be sacrificed. This too can never be experienced as more than a mixed blessing.

Accordingly to Van der Walt, there must be some sort of acknowledgment that law-making is *sacrificial*:

> Law does not reconcile or resolve conflicting interests. It always sacrifices one interest in favour of another in the pursuit of a social goal in a way that can be expected to maintain social order and peace.[94]

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[89]*Id* 88.
[90]Wolcher thus deviates from Walter Benjamin's critique of violence. See Benjamin's 1921 essay 'Critique of violence' in Arendt (ed) *Illuminations* (1968) Harry Zohn (trans). See also Jacques Derrida's response to Benjamin's text in 'Force of law' (n 35).
[91]Wolcher (2008) (n 17) 88.
[92]*Id* 223.
[93]*Ibid*.
[94]See Van der Walt 'Law as sacrifice' (2001) *SALJ* 710.

Van der Walt's account of law as sacrifice is rooted in his understanding of the plurality of the political.[95] In conceiving 'the inevitability of traumatic sacrifices in human and social relationships',[96] Van der Walt argues that a post-*apartheid* theory of law requires an acknowledgment that multiple conflicting rights, needs and interests can only lead to the temporary benefit of some at the cost of others. Similarly to Wolcher's views, this acknowledgement of sacrifice at the heart of law is necessary in order to 'mourn the [inevitable] defeat of the vanquished'[97] and to learn to love the ruins of plurality for 'what else can one love?'[98]

For Van der Walt then, the role of the adjudicator should be that of the 'flipper of coins' or 'juggler'.[99] In this sense, law-doers do not cling to formulas or attempt to reify or justify suffering, but rather let go of both old and new laws in order to be able to begin again:

> She catches hold of them with the clear knowledge, in advance, of having to let go again, forthwith. She is never a master of the situation. The rhythm of existence dictates to her what she is to do. In a way, she abdicates sovereignty … She can only say what the law is today.

Thus, despite the inevitability of law's sacrifice, Van der Walt does remind us that the law 'cannot match the justice of every new day'[100] in much the same way that Wolcher returns us to the words of Heraclitus: '[t]he sun is not only new each day, but forever continuously new'.[101]

Beyond justification, beyond sovereignty?

> Early critique led to crisis and prepared the ground for the revolutions. Our current critical condition may help revive radical thought and action. It is by forgetting (the dominant types of critique) that we might be able to defy the law.[102]

Regardless of the honesty and the candour of the judge in making her chosen decision, the ghost of undecidability will always haunt the instant of a decision that can never be fully just, and thus never fully justifiable.[103] This insight

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[95]See Van der Walt (2005) (n 18). Van der Walt borrows his understanding of the political from the work of Arendt. See also Arendt *The Human Condition* (1989) where she states that 'plurality is the *conditio sine qua non* [and] *conditio per quam* of all public life' (7). This is an understanding of public life in the absence of commonality.
[96]Van der Walt (2005) (n 18) 20.
[97]*Id* 24.
[98]*Id* 197.
[99]*Id* 247.
[100]*Id* 246.
[101]Wolcher (n 17) 211.
[102]Douzinas 'Oubliez critique (forget critique)' http://www.criticallegalthinking.com/Critical_Legal_Thinking/Douzinas.html 25 (accessed 2010-04-21).
[103]Derrida (n 35) 253.

returns me to the central concern of this paper, namely, that the law seems to fail so consistently in its attempts to address human suffering. If we consider Sachs's reasoning in *Soobramoney and Grootboom,* he attempts to impose or *fix* a legal meaning on suffering, and so his justifications – his tendency to see necessary suffering as inevitable – fall short of coming to terms with the suffering individual and the agenda of critical transformative constitutionalism.[104]

As Wolcher and Van der Walt argue, albeit from different perspectives, attempts to give *meaning* to human suffering negate the possibility of doing justice. But, Douzinas maintains that if we re-think human rights as political tools[105] – and not tools to govern from a position of sovereignty – then it may become possible for judg(e)ments to be more politically responsive to suffering and less deferent to those in power. A radical political critique of law would encourage social struggles that attempt to destabilise the master dichotomies and narratives that frame our understanding of the world as it is. This too appears to be the position taken by Van Marle, namely, that the law is inherently reductionist and exclusionary and therefore cannot overcome its own limits.[106] Thus, law-doers are called upon to remain open to a radical politics that resists the law and its insistence on the inevitability of human suffering. As Douzinas puts it: 'critical legal theory must be re-linked with an emancipatory and radical politics'.[107]

Perhaps what is necessary *is* to strip off the blue dress in order to be reminded of the suffering that it masks, even at the expense of losing our sense of certainty and comfort. We *will* fail in our attempts at dressing up law in the garments of justice. Thus, rather than celebrating the ability of a life – any life – to transform law into justice, it is perhaps best to pause and to mourn our complicity in the tragic making of the world. To mourn again and again the tragedy of sacrifices made and even then to question the inevitability – the necessity – of those sacrifices and the order that establishes who suffers and who does not. In *Soobramoney* and *Grootboom* Sachs does not make any radical attempts at questioning the sovereignty of those who decide our fates. He seems to take for granted that there is an 'above … from which to hang the ropes of hangmen'.[108]

As Wolcher puts it, even well-adjusted and well-intentioned law-doers tend to convince themselves that 'the ink stains spattered on the pages of law books are doing all the work, bearing all the responsibility'.[109] Furthermore, once the legal deed is done, these agents of the law and justice '… find themselves able to go home, enjoy their suppers, play with their children, make love, and sleep like

[104]Van Marle (n 31).
[105]See in general Douzinas 2007 (n 71).
[106]See Van Marle 'Equality: An ethical perspective' (2000) 63 *THRHR* 595.
[107]Douzinas (n 102) 13.
[108]Van der Walt (n 18) 120.
[109]Wolcher (n 17) xxii.

babies'.[110] This absence of a sense of discomfort is problematic in the light of the fact that there exists an ethical rupture between the rule of law 'as officially advertised in liberal societies' and life as it is actually lived by our fellow human beings.[111]

Sadly, Albie Sachs – the judge who cried[112] – seems to have left behind his life as a former political activist for his life as a (former) judge in order to sleep comfortably beneath clean white sheets.

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[110] *Id* xxii-xxiii.

[111] *Id* xxiv.

[112] In an interview conducted by Louis Tudor Jones entitled 'The healing of Albie Sachs' in the *Sunday Independent* (2009-05-30) dealing with his book, Sachs refers to his earlier days of being torn between law and justice, and the healing that took place when working on the new Constitution in the 1990s. He describes, towards the end of his article, the 'extremely rich experience [of] being a judge', but does go on to state, as he does in *Strange Alchemy,* that it was 'not without painful moments'. Of particular import is his statement that '[i]ts the most *objective* work I've been called upon to do' (my emphasis). See chapter 7 entitled 'The judge who cried: The judicial enforcement of socio-economic rights' where Sachs reveals that he found himself in tears after ruling that South African Airways could not discriminate against an air steward with HIV/AIDS: 'It had not just been because of emotion about the impact of AIDS on our country. The tears had come because of an overwhelming sense of pride at being a member of a court that protected fundamental rights and secured dignity for all' (Sachs (n 2) 183). See also *Hoffmann v South African Airways* 2001 1 SA 1 (CC); 2000 11 BCLR 1235 (CC).