The right to be different: A retrospective analysis of the Constitutional Court jurisprudence of Justice Albie Sachs – weaving the voice of difference

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Lawrence – dissent Sachs, *Harksen* – dissent Sachs, *National Coalition I* – concurring Sachs, *Home Affairs* – single-Ackerman, *Christian Education* – leading Sachs, *Prince* – dissent, *Jordan* – dissent, *Volks v Robinson* – dissent, *Fourie* – leading Sachs, *Pillay* – leading Langa

Albie Sachs – the person

In attempting to analyse the Constitutional Court jurisprudence of Justice Sachs, it became apparent that it is impossible to do so without first reflecting on the person, Albie Sachs. However, this is itself a daunting undertaking, considering the many facets of this exceptional individual.

However, Sachs himself has often shared his personal experiences as well as those of others[1] in literary works. Sachs narrates that he 'grew up in a political home, a home of books, of ideas and of stimulating people'.[2] His father, Solly Sachs, a prominent trade-unionist and communist, influenced the young Sachs's ideological orientation. At the age of eighteen Sachs read the collected works of Marx and Engels[3] for 'several hours a day'.[4] In addition, Sachs is marked by a strongly

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[1]Naidoo as told to Sachs. *Robben Island: Ten years as a political prisoner in South Africa's most notorious penitentiary* (1982).

[2]Sachs *The free diary of Albie Sachs* (2004) 40.

[3]Marx and Engels *Collected Works* (1975).

[4]*Ibid*. See Sachs (n 2) 13.

developed ethical sensitivity that is in large part a product of his Jewish heritage.[5]

During his law studies at the University of Cape Town in the mid-1950s he joined the African National Congress (ANC). As a young advocate Sachs defended some of those accused of violating Apartheid's racist laws and continued his covert connections to the banned ANC. He was first detained in 1963. The story of his 168 day detention in solitary confinement and interrogation by security police is reported in *The jail diary of Albie Sachs*.[6] In *Stephanie on trial*[7] Sachs' relates the experience of defending Stephanie, who eventually became his wife, and others, charged with destroying State property in protest against apartheid laws. He describes her experience of imprisonment and torture at the hands of the police, as well as his own arrest and torture by sleep deprivation. In 1966 he went into exile in England, where he earned a doctorate from Sussex and taught law at Southampton. During exile he continued to participate in the activities of the ANC.

In 1977 Sachs accepted a position in the Faculty of Law at the University in Maputo,[8] Mozambique, where he, in April 1988, was the target of an assassination attempt by the South African government. *Soft vengeance of a freedom fighter*[9] describes his recovery from the car bomb which destroyed his right arm and blinded him in one eye. In sharp contrast with the above memoirs, he emphasises his cruel struggles with the Apartheid government of South Africa, we observe, in *The free diary of Albie Sachs*, which manifests his wife's (Vanessa September)[10] and his own joyful appreciation for art and their 'sense of fun and capacity for love and tenderness and ... appreciation of the beauty of the world'.[11]

Sachs played a crucial role in South Africa's transitional period. As a member of the ANC National Executive he represented the ANC in the constitutional negotiations that preceded South Africa's transition to democracy. He participated in the drafting of South Africa's interim Constitution[12] and was a prominent figure in debates on the Truth and Reconciliation Commission. He assisted in the design and development of the site of the new building that would house the Constitutional Court, and selected many of the artworks that now fill the completed court building. Of particular importance for the purpose of this article is his appointment in 1994 as one of the first justices of that Constitutional Court, by President Nelson Mandela. The significance of the Constitutional Court as supreme protector of fundamental human rights in a post-Apartheid legal system

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[5]*Ibid.* See Sachs (n 2) at 103.
[6]Sachs *The jail diary* (1966).
[7]Sachs *Stephanie on trial* (1968).
[8]Eduardo Mondlane University.
[9]Sachs *Soft vengeance of a freedom fighter* (1991).
[10]In 2006 Albie Sachs married urban architect Vanessa September.
[11]Sachs *Preparing ourselves for freedom. Spring is rebellious: Arguments about cultural freedom by Albie Sachs and respondents* (1990) 21.
[12]*Id* (n 9). Sachs (n 9) 218.

is unquestionable.[13] In his latest memoir *The strange alchemy of life and law*,[14] Sachs reflects on his fifteen year term on the Court and conveys in an intimate fashion what it has been like to be a judge of the Constitutional Court.

Justice Sachs – the Judge

During Justice Sachs' term as a judge of the Constitutional Court, which ended in September 2009, his jurisprudence has impacted on some of the most important challenges to fundamental rights faced by the Constitutional Court. He did so, not only by the number of leading judgments that he wrote, but also in the creative and at times unconventional lines of reasoning that he found worth exploring, most often expressed in his dissenting or separate judgments.

It has previously been suggested that Justice Sachs is South Africa's literary judge *par excellence*.[15] Parallels have been drawn between Justice Sachs and United States Supreme Court Justice Benjamin Cardozo, in particular, in so far as literature and 'literariness' are concerned.[16] Both judges share a passion for literature which has been a formative influence on their identities. Claims have been put forward that this passion reveals itself in the 'architectonics' of their judgments.[17]

It is interesting to note that Sachs, himself, relates his philosophy of constitutional interpretation to that of Justice Benjamin Cardozo. In *The strange alchemy,* Sachs refers to a lecture prepared by Justice Brennan in honour of Cardozo, in which Brennan mentions Cardozo's awareness of the internal dialogue of passion and reason from which no judge can remain unaffected. Sachs also comments on this interplay of forces, rational and irrational as well as conscious and

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[13]The Constitutional Court has reached the following prominent conclusions regarding the protection of fundamental human rights: the unconstitutionality of the death penalty in *S v Makwanyane* 1995 3 SA 391 (CC); 1995 6 BCLR 665 (CC); the right of unwed fathers in adoption proceedings in *Fraser v The Children's Court* 1997 2 SA 261 (CC); 1997 2 BCLR 153 (CC); denial of the right to dialysis in *Soobramoney v Minister of Health, KwaZulu-Natal,* 1998 1 SA 765 (CC);1997 12 BCLR 1696 (CC); decriminalisation of sodomy laws in *The National Coalition for Gay and Lesbian Equality v The Minister of Justice* 1999 1 SA 6 (CC); 1998 12 BCLR 1517 (CC) (*National Coalition 1 Case*); the right not to be discriminated against on the basis of HIV status in employment applications in *Hoffmann v South African Airways* 2001 1 SA 1 (CC); 2000 11 BCLR 1211 (CC); the rights of parents and children to housing in *The Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), 2000 11 BCLR 1169 (CC); delictual liability of the State in *Carmichele v The Minister of Safety and Security* 2001 4 SA 938 (CC), 2001 10 BCLR 995 (CC); the right of same-sex partners to adopt children in *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC); 2002 10 BCLR 1006 (CC); the responsibility of the State to provide Nevirapine in *Minister of Health v Treatment Action Campaign (2)* 2002 5 SA 721 (CC); 2002 10 BCLR 1033 (CC); the role of public participation in the legislation drafting process in *Doctors for Life International v The Speaker of the National Assembly* 2006 6 SA 416 (CC); 2006 12 BCLR 1399 (CC); and other judgments related to equality and freedom of religion as referred to in (n 31-42).

[14]Sachs *The strange alchemy of life and law* (2009).

[15]Lenta 'The literary judge' (2007) *Stell LR* 313 at 314.

[16]*Id* 313.

[17]*Ibid*.

unconscious, which are central to judicial processes.[18] Sachs claims that the effect of life experience on the judicial mind is inevitable.[19] He confirms the impact of life's experience in *The strange alchemy* when he states that experience becomes part of your being, shaping your responses, reactions and intuitions, and therefore the choices made when reasoning, and which ultimately leads to different outcomes from different judges.[20]

Furthermore it has been asserted that Justice Sachs is a 'gendered' judge.[21] This assertion was made after comparing the voting patterns of the Constitutional Court judges. This comparison indicates that Justice Sachs, together with the women judges,[22] are more likely to write leading judgments or separate judgments in gender cases than they would in their opinions on the whole. Moreover, they are far more likely to agree with one another, and less likely to agree with other members of the Court in gender cases, than in all cases.

In drawing on the description of Sachs as a 'literary', 'gendered' judge this article aims to show that in his imaginatively crafted judgments Justice Sachs has been able to portray the situation of 'the other' with ethical sensitivity. In portraying the position of 'the other' Justice Sachs has initiated a jurisprudence of difference. Similarly to this claim, it has previously been suggested that Justice Ackerman, in the early jurisprudence of the Constitutional Court, spawned a jurisprudence of individualism, when he indicated that at the heart of the constitutional enterprise lay the autonomy of the individual.[23]

In this article the focus will predominantly be on the creative design that Justice Sachs has drawn upon in the crafting of his judgments. The premise is that Justice Sachs through the artistic originality of his judgments initiated a jurisprudence of difference in the adjudication of the Constitutional Court.[24] In addition, this juris-

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[18](N 14) 114.
[19]*Id* 119.
[20]*Id* 239.
[21]Bonthuys 'The personal and the judicial: Sex, gender and impartiality' (2008) *SAJHR* 239 at 239.
[22]In particular, O'Regan J and Mokgoro J.
[23]Davis 'Judge Ackermann and the jurisprudence of mourning' in Barnard-Naudé, Cornell and Du Bois (eds) *Dignity, freedom and the post-apartheid legal order* (2009) 219 at 237 where he refers to an extract from Ackerman's' judgment in *The National Coalition v The Minister of Justice, (National Coalition I)* case (n 13), in which he reiterates that individual freedom is the cornerstone of the Constitution. Likewise the individualised right to dignity, when Ackermann J holds that: 'Dignity is a difficult concept to capture in precise terms. At its least, it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society. The common-law prohibition on sodomy criminalises all sexual intercourse *per anum* between men regardless of the relationship of the couple who engage therein, or the age of such couple, or the place where it occurs, or indeed of any other circumstances whatsoever …. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society' (para 28).
[24]This jurisprudence of difference commenced with the matter of *Lawrence v The State*, *Negal v The State, Solberg v The State* 1997 10 BCLR 1348 (CC), and culminated in the decision of *MEC for Education KwaZulu-Natal v Navaneethum Pillay* 2008 1 SA 474 (CC); 2008 2 BCLR 99 (CC).

prudence of difference was achieved primarily through the innovative manner in which Justice Sachs wove the image of difference into, at first, his dissenting judgments,[25] expanding thereafter, into his concurring judgments,[26] culminating in his leading judgments[27] and over time in leading judgments of the Court.[28]

Sachs himself likens his introduction of the novel concepts in his judgments to the voices of choir members participating in a recital when he states:

> My voice is just one that will enter the discourse, whether in harmony or in discord with the other voices.[29]

In equating the writing of judgments with that of choir members participating in a recital, it seems that Sachs' sees that his task is not to persuade his colleagues of his novel approach immediately. He is, however, aware that he may be introducing a new voice which may lead to a new approach in future cases.[30]

This article consequently reasons that Justice Sachs through introducing his 'voice' wove the image of difference through the creative design of his judgments into the jurisprudence of the Constitutional Court. This tapestry of inclusion was achieved through the introduction of his voice of difference into the choir recital of the Court.

In selecting the cases that form the basis of this discussion, the annual statistics of the Constitutional Court published in the *SAJHR*[31] as well as the

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[25]The dissenting judgments that will be discussed in this article to illustrate the initiation of the jurisprudence of difference will be the judgments of *Lawrence v The State* (n 24); *Harksen v Lane NO* 1997 11 BCLR 1489 (CC); *Prince v President of the Law Society of the Cape of Good Hope* 2002 3 BCLR 231 (CC); *Jordan v S* 2002 11 BCLR 1117 (CC) and *Richard Gordon Volks NO v Ethel Robinson* 2005 5 BCLR 446 (CC).

[26]*National Coalition I* (n 13).

[27]The leading judgments of Sachs J that will be discussed in this article to illustrate the acceptance of the jurisprudence of difference, is the *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC); 2000 10 BCLR 1051 (CC), and *Minister of Home Affairs v Fourie* 2006 3 BCLR 355 (CC); 2006 1 SA 524 (CC) and *Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 3 BCLR 355 (CC); 2006 1 SA 524 (CC).

[28]*MEC for Education v Pillay* (n 24.)

[29](N 14) 145.

[30]*Id* 146.

[31]See Klaaren 'Constitutional Court statistics for the 1995 term' (1996) *SAJHR* 39; Klaaren 'Constitutional Court statistics for the 1996 term' (1997) *SAJHR* 208; Taylor and Klaaren 'Constitutional Court statistics for the 1997 term' (1998) *SAJHR* 277; Klaaren, Dagut, Mochaba, Phalane and Singh 'Constitutional Court statistics for the 1998 term' (1999) *SAJHR* 256; Lenta, McLean, Nteleki, Phalane, Smith and Klaaren 'Constitutional Court statistics for the 1999 term' (2000) *SAJHR* 364; Budlender, Farooqi, McLean and Nzimande 'Constitutional Court statistics for the 2000 term' (2001) *SAJHR* 277; Teichner, Hofmeyr, Ali, Ramosa and Moshodi 'Constitutional Court statistics for the 2001 term' (2002) *SAJHR* 463; Klaaren, Shefer, Ali and Molepo 'Constitutional Court statistics for the 2002 term' (2003) *SAJHR* 506; Klaaren, Stein, Madekurowzwa and Xulu 'Constitutional Court statistics for the 2003 term' (2004) *SAJHR* 491; Klaaren, Stein and Xulu 'Constitutional Court statistics for the 2004 term' (2005) *SAJHR* 636; Bishop, Chamberlain, Smit, Stein, Franco and Vukeya 'Constitutional Court statistics for the 2005 term' (2006) *SAJHR* 518; Bishop, Chamberlain, Kazee and Stein 'Constitutional Court statistics for the 2006 term' (2007) *SAJHR* 386.

statistical analysis of the twelve-year combined review of the work of the Constitutional Court have been drawn upon.[32] The annual statistics as well as the twelve-year analysis indicate that Sachs has a reputation for writing concurring judgments as 'borne out by the fact that he is top of this list' of judges who have written concurring judgments.[33] Over the period reviewed Justice Sachs had written 28 concurring judgments and in this he was followed by O' Regan J who has written 11 concurring judgments. Justice O'Regan, on the other hand, is recognised as the judge who has written the highest number of dissenting judgments, 17 in total. Then again, in this she is closely followed by Justices Sachs who had written nine dissents.[34] The focus will next turn to the dissenting judgments of Justice Sachs.

Justice Sachs' through his creative flair as a literary judge, drew on his artistic originality, sustained by his love for literature, when writing these dissenting judgments. His ability to visualise himself in the shoes of the other and to depict this reality in a convincing manner allowed for the struggles and aspirations of the other to be introduced into the jurisprudence of the court.

The voice of dissent of Justice Sachs

During the first twelve years of the Constitutional Court, Justice Sachs wrote dissenting judgments and co-authored dissenting judgments in the following 13 matters:

S v Mhlungu;[35]
Coetzee v Government of the Republic of South Africa and Matiso v The Commanding Officer, Port Elizabeth Prison;[36]
Lawrence v The State, Negal v The State, Solberg v The State;[37]

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[32]Bishop, Chamberlain and Kazee 'Twelve-year review of the work of the Constitutional Court: A statistical analysis' (2008) *SAJHR* 354.
[33]*Id* 356.
[34]*Id* 355.
[35]*S v Mhlungu* 1995 7 BCLR 793 (CC). The matter dealt with the applicability of the Constitution to court proceedings pending before the commencement of the Interim Constitution. The majority judgment was written by Mahomed J (concurrences: Langa J, Madala J, Mokgoro J and O'Regan J). Dissenting judgments were delivered by Kentridge AJ (concurrences: Chaskalson P, Ackermann J and Didcott J) as well as a dissenting concurrence by Sachs J.
[36]*Coetzee v Government of the Republic of South Africa; Matiso v The Commanding Officer, Port Elizabeth Prison* 1995 10 BCLR 1382 (CC). This matter dealt with the imprisonment of judgment debtors as provided for by s 65 of the Magistrates' Courts Act. The majority judgment was written by Kriegler J (concurring: Chaskalson P, Mahomed DP, Ackermann J, Madala J and O'Regan J). A dissent was written by Didcott J with separate concurrences by Kentridge J, Langa J, Sachs J and Mokgoro J.
[37](N 24). This matter was an appeal from criminal convictions in terms of the Liquor Act 27 of 1989, regulating times and days of sales by grocers, and the types of alcoholic beverage which grocers can sell were challenged on the basis of freedom of economic activity and, in relation to closed days, freedom of religion. The majority judgment was written by Chaskalson P. With a dissenting judgment prepared

Harksen v Lane NO;[38]
Fedsure Life Assurance Ltd v The Greater Johannesburg Transitional Metropolitan Council;[39]
Prince v President of the Law Society of the Cape of Good Hope;[40]
Bel Porto School Governing Body v Premier of the Western Cape Province;[41]
Van Der Walt v Metcash Trading Limited;[42]

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by O'Regan J (concurrence: Goldstone J) and a separate dissenting concurrence by Sachs J.

[38](N 25). An application for a declaration of constitutional invalidity of s 21 and parts of ss 64(2) and 65(1) of the Insolvency Act 24 of 1936, on the basis of right to property and equality. The majority judgment was written by Goldstone J, with dissents by O'Regan J and Sachs J focusing on the fact that the property of the solvent spouse should not vest in the Master of the High Court as this perpetuates the stereotyped and outdated view of women and their role in marriage.

[39]1998 12 BCLR 1458 (CC). This case was a referral from the Supreme Court of Appeal for consideration by the Constitutional Court to consider primarily the lawfulness of the resolutions adopted by the Greater Johannesburg Transitional Metropolitan Council and the Eastern Metropolitan Substructure in terms of which a general rate was imposed on rate payers owning land, and rights in land, throughout the area. The majority judgment was written by Chaskalson P, Goldstone J and O'Regan J (concurrence: Ackermann J and Madala J). The dissenting judgment was written by Kriegler J (concurrence: Langa DP, Mokgoro J, Sachs J and Yacoob J.

[40](N 25). In this matter the constitutional validity of the prohibition on the use or possession of cannabis when its use or possession was inspired by religion was questioned. The majority, per Chaskalson CJ, held that Rastafarianism was a religion and therefore the legislation impacted on the Rastafarian's individual right (s 15 of the Interim Constitution of the Republic of South Africa Act 200 of 1993) and collective rights (s 31 of the Interim Constitution of the Republic of South Africa Act 200 of 1993) to practice their religion. However, to allow harmful drugs to be used by certain people for religious purposes would impair the State's ability to enforce its drug legislation. A dissenting judgment was put forward by Ngcobo J, Sachs J, Mokgoro J and Madlanga AJ arguing that the regulation of cannabis for religious purposes would not unduly burden the state.

[41]2002 9 BCLR 891 (CC). In this matter the Western Cape Education Department (WCED) had undertaken a restructuring process to rationalise education in the province and rectify the disparities caused by the previous government. The majority held that the plan was rational particularly given that WCED had its own surplus staff without having taken on the Elsen staff and therefore held that there was no violation of the right to equality. Accordingly the WCED had complied with the right to just administrative action in terms of s 24 of the Interim Constitution of the Republic of South Africa Act 200 of 1993. Justices Mokgoro and Sachs filed a joint dissenting judgment and Justices Ngcobo and Madala filed separate dissenting judgments.

[42]2002 5 BCLR 454 (CC). In this matter application for special leave to appeal alternatively for direct access was made to the Constitutional Court. On two successive days the Supreme Court of Appeal refused leave to appeal to one petitioner and granted leave to appeal to another petitioner. The applications were based on identical facts which were considered by different panels of judges. The applicant argued that the effect of the decisions was irrational and arbitrary and in conflict with the rule of law and that right to access to court had been violated. Further that his right to equality before the law and the right to equal protection and benefit of the law had been violated by the different outcomes of the two decisions. The majority of the Court per Goldstone J held that the Applicant's constitutional rights had not been violated by the contrary decisions. There was nothing to suggest that the decisions were made arbitrarily. Section 9(1) does not guarantee equality of outcome and s 34 was not violated. A dissent was filed by Ngcobo J, Madala J and Sachs J.

Jordan v S;[43]
Richard Gordon Volks NO v Ethel Robinson;[44]
David Dikoko v Thupi Zacharia Mokhatla;[45] and the matter of
Barend Petrus Barkhuizen v Ronald Stuart Napier.[46]

In analysing these dissenting judgments, it is apparent that in particular the enjoyment of the right to freedom of religion, as deliberated in the *Lawrence* and *Prince* cases as well as the right to gender equality as considered in the *Harksen, Jordan* and *Volks v Robinson* cases, have repeatedly provoked a different opinion from Justice Sachs. It is interesting to note that in *The strange alchemy*, Sachs too specifically reflects on the above cases when writing on human dignity and proportionality. He discusses the right to dignity as the unifying constitutional principal in an extremely diverse and unequal society and reflects in particular on the rights of marginalised religious groups as well as on society outside of mainstream family and sexual relationships.[47] In these matters, Sachs' calls for a celebration of the right to be different in accordance with the foundational

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[43](N 25). In this case, the constitutionality of those sections of the Sexual Offences Act 23 of 1957 which criminalise the sex worker for prostitution were questioned. The Court unanimously upheld the constitutionality of the brothel provisions, but were split 6-5 with respect to the criminalising of the sex worker for prostitution with the majority finding the provisions constitutional. A majority judgment written by Ngcobo J found that the challenged provisions were not unconstitutional. (Chaskalson CJ, Kriegler J, Madala J, Du Plessis AJ and Skweyiya AJ concurred). A dissenting judgment was written by O'Regan J and Sachs J (Langa DCJ, Ackermann J and Goldstone J concurred) which found that s 20 (1)(aA) brought about indirect unfair discrimination. Section 20(1)(aA) unjustifiably limited both s 8 and s 13 of the Interim Constitution of the Republic of South Africa Act 200 of 1993.

[44](N 25). In this matter the High Court found the exclusion of permanent life partners from the provisions of the Maintenance of Surviving Spouses Act 27 of 1990, to be in violation of the right to equality and dignity, and therefore unconstitutional. Skweyiya J writing for the majority found that the distinction between married and unmarried people was not unconstitutional as the distinction is not unfair and therefore did not amount to unfair discrimination, and did not violate dignity. Ngcobo J found in a separate concurring judgment further that the provisions of the Act do not impair dignity, do not unfairly discriminate and are therefore not unconstitutional. Sachs J in a dissent found that the critical question was whether there was a family relationship of such proximity and intensity as to render it unfair to deny the right to claim maintenance after death. Mokgoro J and O'Regan J in a joint dissent found the provisions to constitute unfair discrimination on the grounds of marital status.

[45]2007 1 BCLR (CC). The Constitutional Court in dealing with statements made by a municipal councillor, in the majority judgment by Mokgoro J, held that defamatory statements made outside of the business of the Municipal Council are not privileged and that appellate courts will only interfere with damages awards where special circumstances warranting such interference exist. A dissenting judgment was written by Sachs J.

[46](*Barkhuizen v Napier)* 2007 5 SA 323 (CC); 2007 7 BCLR 691 (CC). In this matter a constitutional challenge was brought concerning a time limitation clause in a short-term insurance contract requiring the applicant to institute court proceedings within 90 days. The clause was held not to be unconstitutional or contrary to public policy in the majority judgment written by Ngcobo J (concurring Madala J, Nkabinde J, Skweyiya J, Van der Westhuizen J and Yacoob J). A separate concurrence was written by O'Regan J and Langa CJ. A dissenting judgment was written by Sachs J and Moseneke DCJ (concurring Mokgoro J).

[47](N 14) 210-12.

character of the right to human dignity in terms of which diversity is presupposed and it is aspired to accept people for who they are.[48]

This article will next examine the above-mentioned dissenting judgments of Justice Sachs. The focus will be firstly on the dissents in the gender equality cases, followed by an analysis of the dissents in cases dealing with the right to freedom of religion.

Gender equality

The likelihood of which judges will hand down dissenting judgments has previously been commented upon.[49] The conclusion was made that female judges are more often likely to hand down a dissenting judgment in gender matters than in other cases.[50] Justice Sachs was included in the selection of female judges, as it was of the opinion that his judgments on gender always reflect 'feminist reasoning' and that his judgments are sometimes 'even more radical than those of the women'.[51]

The dissents in these gender matters are particularly influential as they involve socially sensitive issues. In all three of these cases Justice Sachs has been able to provide an alternative to conservative patriarchal viewpoints concerning issues of gender.[52] He has done this by being perceptive of the needs of women and the controversies that surround them. Sachs has been able to position himself in the situation of women who have suffered systemic disadvantage through the application of stereotypical patriarchal conservative morality which denies the full diversity of relations that in reality exists.

This alternative viewpoint is indeed reflected in the dissenting judgment of Justice Sachs in both *Harksen v Lane* and *Volks v Robinson* in which Sachs reflects on the diversity of family relations. The joint dissent of Sachs J and O'Regan J in

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[48] *Id* 214.

[49] (N 21) 239.

[50] In *Harksen v Lane* (n 25), one dissenting judgment written by O' Regan J with Madala J and Mokgoro J concurring. In *Volks v Robinson* (n 25), one dissenting judgment was handed down by Sachs J and the other by Mokgoro and O'Regan JJ. Sachs J also handed down a joint dissent in *Jordan v S* (n 28) with O'Regan J; Mokgoro J did not sit in the case of *Jordan.*

[51] (N 1) 261.

[52] For general discussions of the right to equality and the application thereof in South Africa (which is not the main focus of this article), see Albertyn and Goldblatt 'Equality'in Woolman *et al* (eds) *Constitutional law of South Africa* (2003) (2nd ed) ch 35, Currie and De Waal *The bill of rights handbook* (2005) (5th ed) ch 9, Albertyn 'Equality' in Cheadle *et al* (ed) *South African Constitutional law: The bill of rights* (2002), Carpenter 'Equality and non-discrimination in the new South African constitutional order (1): The early cases' (2001) 64 *THRHR* 409; 'Equality and non-discrimination in the new South African constitutional order (2): An important trilogy of decisions' (2001) 64 *THRHR* 619; 'Equality and non discrimination in the new South African constitutional order (3): The saga continues' (2002) 65 *THRHR* 37; 'Equality and non-discrimination in the new South African constitutional order (4): Update' (2002) 65 *THRHR* 177; as well as Cowen 'Can "dignity" guide South Africa's equality jurisprudence?' (2001) 17 *SAJHR* 34; De Vos 'Equality for all? A critical analysis of the equality jurisprudence of the Constitutional Court' (2000) 63 *THRHR* 62.

Jordan v S also exposes the conservative morality of the sex trade industry. The majority judgments in this case induced fervent criticism from feminist academics, and, although the dissenting judgments did not entirely escape criticism, they at least represented an awareness of the gender implications of these issues.[53]

The ability of Sachs to become the voice of the victims of systemic disadvantage, *in casu* women, and to hoist this choir of voices of difference into the adjudication of the court will next be considered.

Harksen v Lane

The matter of *Harksen v Lane*,[54] dealt with an application for a declaration of the constitutional invalidity of, in particular, section 21 of the Insolvency Act 24 of 1936, as well as parts of sections 64(2) and 65(1) on the basis of rights to property and equality. Section 21 provides that, upon the sequestration of the estate of an insolvent spouse who was married in community of property, the property of the solvent spouse vests in the Master of the High Court or in the trustee of the insolvent estate.

Goldstone J writing on behalf of the majority held that, even though the section discriminates between the solvent spouse of an insolvent and other persons who may have had dealings or close relationships with the insolvent, such discrimination is not unfair, as this discrimination does not lead to an impairment of the fundamental dignity of the solvent spouse.[55]

It has been suggested that the majority decision in *Harksen* accentuates that the majority seems to be blind to the ways in which section 21 of the Insolvency Act entrenches stereotypical views of marriage.[56] Their judgment not only underestimates the adverse impact of section 21 on the solvent spouse,[57] but also fails to come to terms with the stereotypical power relations which underlie and are perpetuated by the provision.

Justice Sachs in a separate dissent strongly criticises the viewpoint of the majority on marriage. He draws attention to the ways in which the majority judgment perpetuates the stereotypical relationship between husband and wife and encourages disdain for a diversity of family relationships. He argues that the dignity of the solvent

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[53]On *Jordan v S* see Le Roux 'Sex work, the right to occupational freedom and the constitutional politics of recognition' (2003) *SALJ* 452, Krüger 'Sex work from a feminist perspective: A visit to the *Jordan* case' (2004) *SAJHR* 138; Carpenter 'Of prostitutes, pimps and patrons – some still more equal than others' (2004) *SAPR/PL* 231; Fritz 'Crossing Jordan: Constitutional space for (un)civil sex' (2004) *SAJHR* 230; Meyerson 'Does the Constitutional Court of South Africa take rights seriously? The case of *S v Jordan*' (2004) *Acta Juridica* 138; Bonthuys 'Women's sexuality in the South African Constitutional Court: *Jordan v S*' (2006) 14 *Feminist Legal Studies* 391.

[54](N 25).

[55]*Id* 119.

[56]Van der Walt and Botha 'Coming to grips with the new constitutional order: Critical comments on *Harksen v Lane NO*' (1998) 13 *SA Public Law* 17; Botha 'Equality, dignity, and the politics of interpretation' (2004) 19 *SAPR/PL* 724.

[57](N 25). Dissent O'Regan J paras 88, 96-100.

spouse is indeed adversely affected in a manner which is unfair and accordingly in violation of section 8(2) of the Interim Constitution. He expresses the view that section 21 is 'manifestly patriarchal in origin',[58] and promotes 'a stereotyped and outdated view of marriage' which reduces the self-worth of married persons in that it:

> inhibits the capacity for self-realisation of the spouses, affects the quality of their relationship with each other as free and equal persons within the union, and encourages society to look at them not as 'a couple' made up of two persons with independent personalities and shared lives, but as 'a couple' in which each loses his or her individual existence.[59]

In his opinion the effect of allowing the property of the solvent spouse to vest in the Master of the High Court, was to promote an idea that 'one business mind is at work within a marriage and not two'[60] and this perception is a direct and serious invasion of the fundamental dignity of the other spouse.

Justice Sachs contends that the majority decision reinforces social patterns that deny the achievement of equality. He contends further that although the intrusion might appear trivial, the discrimination and domination falls within the ambit that section 8(2)[61] of the Interim Constitution addresses, in that the discrimination:

> [M]ay be constructed not only, or even mainly, by the grand exercise of naked power. It can also be established by the accumulation of a multiplicity of detailed, but interconnected, impositions, each of which, de-contextualised and on its own, might be so minor as to risk escaping immediate attention, especially by those not disadvantaged by them.[62]

It is evident that Sachs employs the same technique that is used in literary works, for he directs the awareness of the sensitive observer to the small impositions of power imbalance that otherwise might have escaped the observation of those unaffected. Sachs insists that these small impositions accumulate and in connection with other trivial impositions, result in extensive subjugation. This awareness of the stereotypical relationship between husband and wife which encourages disdain for a diversity of possible family relationships is also challenged in the dissenting judgment of *Volks v Robinson.*

Volks v Robinson

The financial consequences of marriage were once again the issue of concern in the

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[58] *Harksen v Lane* (n 25). Dissent Sachs J para 120.
[59] Id 124.
[60] *Id* 121.
[61] No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.
[62] (N 25) 123.

matter of *Volks NO v Robinson*.[63] The applicant had lived with an attorney for sixteen years. On his death she applied to be considered a 'spouse' in terms of the Maintenance of Surviving Spouses Act 27 of 1990 or, alternatively, to have the legislation declared unconstitutional because it discriminated against her on the basis of her lack of marital status and infringed on her dignity. The exclusion of permanent life partners from the protection offered in terms of the Maintenance of Surviving Spouses Act was found by the High Court[64] to be in violation of the right to equality and dignity and therefore unconstitutional. In the subsequent appeal to the Constitutional Court, there were two separate majority judgments: one by Justice Skweyiya and another by Justice Ngcobo, in both of which it was held that the distinction between married and unmarried people does not impair dignity, and is not innately unfair and therefore does not unfairly discriminate and is not unconstitutional.

One dissenting judgment was handed down by Sachs J and two other dissenting judgments by Mokgoro J and O'Regan J. In the dissent of Sachs J he referred to the principle of restricting claims under the Act to married survivors only, as the 'exclusivity principle'.[65] He once again confirms the point of view, as set out in *Harksen*, that the importance attached to marriage, the stereotypical relationship between husband and wife, encourages disdain for the diversity of other possible family relationships:

> The issue should not be seen exclusively as one of the sanctity of marriage, or simply of the important social purpose that marriage serves, but as one of the integrity of the family relationship. Conventional condemnation of such relationships, though less powerful than it used to be, is a dangerous backcloth against which to consider fundamental rights.[66]

In his evaluation of the fairness of the exclusion, he asserts that the critical question must be whether there was a family relationship of mutual dependency amongst the parties. The mutual dependency is based on equal 'care and concern' rather than the provision of 'equal support in material or financial terms' and the responsibility arises from:

> … the nature of the particular life partnership itself. The critical factor will be whether the relationship was such as to produce dependency for the party who, in material terms at least, was the weaker and more vulnerable one (and who, in all probability, would have been unable to insist that the deceased enter into formal marriage). The reciprocity would be based on care and concern rather than on providing equal support in material or financial terms.[67]

In the existence of a commitment to equal care and concern amongst the parties it is unfair to deny the right to claim maintenance after death and this

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[63](N 25).
[64]*Robinson v Volks NO* 2004 6 SA 288 (C).
[65](N 25) para 209.
[66]*Id* para 217.
[67]*Id* para 218.

exclusion cannot be justified.[68] Sachs therefore found that the critical question was whether there was a family relationship of such proximity and intensity as to render it unfair to deny the right to claim maintenance after death. He further argues that resistance to the acknowledgement of the existence of these intimate life partnerships is 'inappropriate for an open and democratic society that acknowledges diversity of lifestyle'.[69]

Justice Sachs creatively weaves the need to recognise diversity throughout the dissenting judgment in *Volks v Robinson.*[70] He refers to the *First Certification* case[71] where the Court held that: 'Families are constituted, function and are dissolved in such a variety of ways, … .[72]'
As well as *Dawood*[73] where O'Regan stated that: '[F]amilies come in many shapes and sizes'.

Together with the statements of Ackermann J in the *National Coalition (2)*[74] pointing out that:

> South Africa occupies a distinctive position in the context of developments in the legal relationship between family members and between the State and the family. Its heterogeneous society is "fissured by differences of language, religion, race, cultural habit, historical experience and self-definition" and, consequently, reflects widely varying expectations about marriage, family life and the position of women in society.

Through incorporating these past judgments Justice Sachs emphasises that the unifying theme in all of the above decisions is the 'evolving approach [of the Court] to all the different forms of family units being created'.[75] In this manner, Sachs weaves through 'accumulation and interconnectivity'[76] the right to be different into the jurisprudence of the Constitutional Court.

In his dissenting judgment emphasis is placed on the need to recognise diversity of family formations in South Africa.[77] The dissent is constantly mindful of the acknowledgement of diversity and that different forms of family life are tolerated.[78] Justice Sachs is constant in referring to the 'right to be different', the right which he first introduced in his dissent in the *Lawrence*[79] matter, when he stated that:

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[68] *Id* para 236.
[69] *Id* para 216.
[70] *Id* para 210.
[71] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa,* 1996 4 SA 744 (CC) (*First Certification* Case).
[72] *Id* para 99.
[73] *Dawood v Minister of Home Affairs, Shalabi v Minister of Home Affairs, and Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC) para 47.
[74] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (n 13) para 47.
[75] *Volks NO v Robinson* (n 25) para 212.
[76] *Harksen v Lane* (n 25) 123.
[77] *Volks NO v Robinson* (n 25) para 210.
[78] *Id* para 188.
[79] (N 24) para 147.

> Further evidence of the importance attributed by our Constitution to the respect for diversity is contained in the postscript, where the emphasis on reconciliation so as to overcome the strife and division of the past, underlines the importance of tolerance and mutual accommodation as one of the underpinnings of our new constitutional order. Openness coupled with diversity presupposes that persons may on their own, or in community with others, express the *right to be different* in belief or behaviour, without sacrificing any of the entitlements of the right to be the same in terms of common citizenship (footnotes omitted, own italics).

Justice Sachs takes the thread of difference, which he first wove into the dissent in the *Lawrence* case and weaves this thread together with similar threads found in the judgment of the whole court in the *First Certification* case as well as the sentiments of O'Regan J in *Dawood* and Ackermann J in *National Coalition I* case. To use a metaphor created by Sachs himself,[80] his introduction of the voice of 'discord' or difference reverberates in the judgment of *Volks* and ultimately reaches a crescendo of the celebration of the right to be different in the matter of *Pillay.*[81]

The judgment in *Jordan v S*[82] also reflects the popular prejudice against women who transgress the '"Calvinist and conservative" public morality of yesteryear'[83] by not merely 'living in sin',[84] but by exchanging sex for economic gain. In the matter, both the majority judgments reflect on the choices exercised by the applicants and in doing so separate the legal rules from their social and economic context. In this manner both cases fail to give effect to substantive equality.[85]

The alternative viewpoint, conscious of social and economic circumstances, as reflected in the dissenting judgment of Justice Sachs in the matters of *Harksen* and *Volks v Robinson* is once again prevalent in the joint dissent of Sachs and O'Regan JJ in the matter of *Jordan.*

Jordan v S

In the matter of *Jordan v S* the issue before the court was whether provisions in the Sexual Offences Act 23 of 1957 relating to the criminal offences of brothel keeping as well as the provisions of the act pertaining to 'unlawful carnal intercourse' for reward were unconstitutional. The judges of the Constitutional Court were unanimous in finding the brothel provisions constitutional, but were divided six to five on the prostitution provision. The statutory provisions that criminalise the behaviour of prostitutes, but fail to similarly punish their clients, were challenged because they discriminated on the basis of gender and because

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[80](N 14) 145.
[81]*MEC for Education KwaZulu-Natal v Pillay* (n 24).
[82](N 25).
[83]*Volks NO v Robinson* (n 25) para 218.
[84]*Id* para 218.
[85]Bonthuys 'Institutional openness and resistance to feminist arguments: The example of the South African Constitutional Court' (2008) 20/1 *Canadian Journal of Women and the Law* 1-36 at 34.

they infringed upon prostitutes' rights to dignity and privacy.[86] In a narrow majority judgment by Justice Ngcobo, the court denied that the distinction between prostitute and client was based directly or indirectly on gender, holding that the Act applied equally to male and female prostitutes.[87] They reasoned that, even though the legislation did not criminalise the client's behaviour, he could be prosecuted as a *socius criminis* under the common law and under the provisions of the Riotous Assemblies Act 17 of 1956.[88]

The minority judgment (handed down by Sachs and O'Regan JJ) forms a stark contrast to the majority judgment. O'Regan and Sachs JJ set out three differences between prostitute and patron concisely:

> The first is that the one pays and the other is paid. The second is that in general the one is female and the other is male. The third is that the one's actions are rendered criminal by section 20(1)(aA) but the other's actions are not … the effect of making the prostitute the primary offender directly reinforces a pattern of sexual stereotyping which is itself in conflict with the principle of gender equality.[89]

O'Regan and Sachs JJ continued, stressing the sexual double standards in our society which condemn the (female) prostitute, but view the (male) customer's actions as normal in the following terms:

> [T]he stigma is prejudicial to women, and runs along the fault lines of archetypal presuppositions about male and female behaviour, thereby fostering gender inequality ... Although the difference may on its face appear to be a difference of form, it is in our view a difference of substance, that stems from and perpetuates gender stereotypes in a manner which causes discrimination. The inference is that the primary cause of the problem is not the man who creates the demand but the woman who responds to it: she is fallen, he is at best virile, at worst weak. Such discrimination, therefore, has the potential to impair the fundamental dignity and personhood of women.[90]

The dissent focuses on the way in which legislation such as the Sexual Offences Act has been based on the stereotypical patriarchal conservative morality as identified in the dissenting judgments of Sachs J in *Harksen*, which focused on the stereotypical roles of men and women in marriage.[91] This stereotypical relationship was also highlighted in the dissenting judgments of Sachs J in *Volks v Robinson* which emphasised the patriarchal 'Calvinist and conservative' public morality[92] that forms the basis of recognition of family arrangements and financial responsibilities. Sachs J in the dissenting judgment in particular condemns the

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[86] *Sexual Offences Act*, Act 23 of 1957, s 20(1)(a).
[87] *Jordan v S* (n 25) paras 17-18.
[88] For a comprehensive discussion of the judgment see Botha 'Equality, dignity, and the politics of Interpretation' (2004) 19 *SAPR/PL* 724-751.
[89] *Jordan v S* (n 25) para 60.
[90] *Id* para 65.
[91] *Harksen v Lane* (n 25) 120.
[92] (N 25) 218.

impugned legislation as manifestly patriarchal, and once again refers to the reinforcement of social patterns that deny the achievement of the ideal of equality.

It has been contended that this split between the majority and minority has more to do with different social visions and underlying moral and political assumptions than with differences about the appropriate principle governing the case.[93] It is the 'prostitute' in *Jordan* to which the majority is less sensitive with regard to the 'systematic motifs of discrimination' and 'patterns of systemic disadvantage' and their impact on vulnerable groups or classes of persons than the minority.[94] The majority is apparently less eager to afford equal respect and dignity to 'bad women'.[95]

It is remarkable to observe the manner in which Justice Sachs in his dissenting judgments in the matters of *Harksen, Volks v Robinson* and *Jordan* repetitively refers to the existence of patriarchal stereotyping and conservative public morality. The existence of these factors he states does not allow for a full appreciation of the diversity of family relationships and substantive equality. He is constantly mindful of the small impositions of power imbalance, which over time, result in stark oppression.

It is interesting to note that Sachs through the creative design of his judgments employs the same *modus operandi* of power imbalance, that is to say that through accumulation and interconnectivity small impositions lead to extensive discrimination.[96] He makes use of similar accumulation in his dissenting judgments, but it is an accumulation of the language of difference in order to reinforce a language of the celebration of 'the right to be different' and a language of diversity.[97] His unwavering commitments to social equality and to the dismantling of stereotypes that are the basis for unfair discrimination are plentiful. These judgements discussed and all have displayed incomparable sensitivity to those who have been, as he puts it, 'relegated to the space of the deviant "Other"'.[98] Justice Sachs, through creative design, has crafted a jurisprudence of the right to be different.

This awareness of the other is further encapsulated in his saying: 'the right to be different'.[99] The right to be different is not included in the Bill of Rights as a specific right, but Justice Sachs' reference to this right does indicate his sensitivity to the following two claims: The first claim includes a demand that 'difference should not be viewed as the basis for treating unequally [those] whose appearance, physical attributes, behaviour or religious beliefs deviate from the perceived "norm"' whilst the second claim calls for "cultural or religious

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[93](N 88) 742.
[94](N 53) 249.
[95](N 85) 1-36 at 33.
[96]*Harksen v Lane* (n 25) 123.
[97]*Lawrence v The State* (n 24) para 147.
[98]*Id* para 152.
[99]*Id* para 147.

accommodation"'.[100] This approach is also evident in the dissenting judgments of Justice Sachs in matters pertaining to the right to freedom of religion, which will be dealt with next.

The right to freedom of religion

Similar to the manner in which Sachs has made every effort to dismantle the stereotypes that impact on the right to gender equality in his dissenting judgments of *Harksen v Lane NO* and *Volks v Robinson*, where his sensitivity towards those who form part of different family arrangements has been illustrated, and he has demanded that their difference should not be viewed as a basis for their unequal treatment, so Justice Sachs has gone further to ensure substantive equality in his demand for cultural or religious accommodation.[101] This demand is evident in the dissenting judgments of Justice Sachs in matters pertaining to the right to freedom of religion, as extrapolated in the cases of *Lawrence* and *Prince,* which will be dealt with next.

S v Lawrence

The matter of *S v Lawrence* was an appeal from the criminal convictions of Ms Solberg, an employee at a Seven Eleven chain store, who had contravened section 90(1) of the Liquor Act, Act 27 of 1989, which proscribed wine sales on Sunday. The Liquor Act regulates the times, days and types of alcoholic beverages which grocers can sell. These provisions were challenged on the basis of freedom of economic activity and, in relation to closed days, upon freedom of religion. The majority judgment written by Chaskalson P held that there was no infringement. A dissenting

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[100](N 15) 327.

[101]For general discussions of the right to freedom of religion and the application thereof in South Africa (which is not the main focus of this article), see Farlam 'Freedom of religion, conscience, thought and belief' in Woolman *et al* (eds) *Constitutional law of South Africa* (2003) (2nd ed) ch 41, Meyerson 'Religion and the South African Constitution' in Radan, Meyerson and Croucher (eds) *Law and religion* (2005) ch 5,I; Currie and De Waal *The bill of rights handbook* (2005) (5th ed) ch 15 and Kende *Constitutional rights in two worlds: South Africa and the United States* ch 8; Edge, Heyns and Viljoen *Legal responses to religious difference* (2002); Smith 'Freedom of religion' in Chaskalson *et al* (ed) *Constitutional law of South Africa* (2004); Davis 'Religion, belief and opinion' in Cheadle *et al* (ed) *South African constitutional law: The bill of rights* (2002); Du Plessis 'Religion, law and the state in South Africa' (1997) *European Journal for Church and State Research* 221; Ackermann 'Some reflections on the Constitutional Court's freedom of religion jurisprudence' (2002) 43 *Dutch Reformed Theological Journal* 178; Malherbe 'Enkele kwelvrae oor die grondwetlike beskerming van die reg op godsdiensvryheid' (2006) *TSAR* 629–650; Kroeze 'God's kingdom in the law's republic: Religious freedom in South African constitutional jurisprudence' (2003) 19 *SAJHR* 469-585. For a specific discussion on the right to manifest religious beliefs see Lenta 'Cultural and religious accommodations to school uniform regulations' (2008) 1 *Constitutional Court Review* 259; Lenta 'Muslim headscarves in schools and in the workplace' (2007) 124 *SALJ* 296, 298-299; Lenta 'Religious liberty and cultural accommodation' (2005) 122 *SALJ* 352, 363-371.

judgment prepared by O'Regan J (concurrence: Goldstone J) held the view that there was an encroachment of the right to freedom of religion. A separate dissenting concurrence written by Sachs J held that although there was an encroachment, the limitation was justified. Van der Vyver alerts us to the identification of religious favouritism in the concurring dissenting opinion of Justice Sachs which in essence held that the coupling of Sundays, Good Friday and Christmas Day as 'closed days' for the purpose of a grocer's wine license amounted to endorsement by the State of the Christian Sabbath.[102]

In his dissent Sachs J makes reference to how:

> any endorsement by the state today of Christianity as a privileged religion not only disturbs the general principle of impartiality in relation to matters of belief and opinion, but also serves to activate memories of painful past discrimination and disadvantage based on religious affiliation.[103]

The language of power is used to illustrate that even 'apparently harmless provisions' may have deep implications.[104] Just as the endorsement of stereotypical patriarchal conservative morality excludes different family relationships in *Harksen* and *Volks v Robinson,* Sachs J argues in *Lawrence* that these apparently harmless provisions 'convey a message of exclusion'.[105] Sachs goes further in the matter of *Lawrence* and demands not only substantive equality but, in addition, calls for respect for diversity as well as tolerance and mutual accommodation. This openness coupled with diversity according to Sachs J presupposes that:

> [P]ersons may on their own, or in community with others, express the right to be different in belief or behaviour, without sacrificing any of the entitlements of the right to be the same in terms of common citizenship.[106]

The appreciation of difference and the accommodation thereof without placing difference in a hierarchical framework, in which the state would appear to take sides,[107] as referred to by Sachs J in the *Lawrence* case, is reminiscent of his demands in the *Harksen* and *Volks v Robinson* cases, that stereotypical patriarchy and conservative morality should not dictate which kinds of family relationships are recognised.

These requests of Sachs J to appreciate difference and to accommodate such difference in a non-hierarchical framework of equality and non-discrimination are amplified in his dissenting judgement in the matter of *Prince.*

Prince v President of the Law Society of the Cape of Good Hope

In the matter of *Prince v President of the Law Society of the Cape of Good*

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[102]Van der Vyver 'The contours of religious liberty in South Africa' (2007) 21 *Emory International LR* 77-110, 99.
[103](N 24) 152.
[104]*Id* 153.
[105]*Id* 170.
[106]*Ibid*.
[107]*Ibid*.

Hope[108] the constitutional validity of the prohibition on the use or possession of cannabis inspired by religion was questioned by the Constitutional Court. The Law Society of the Cape of Good Hope had refused to register Prince's contract of community service as a candidate attorney because of his religious habit of smoking marijuana.[109] The majority, per Chaskalson CJ, held that Rastafarianism was a religion and therefore the legislation impacted on the Rastafarians' individual right (s 15 of the Interim Constitution) and collective right (s 31 of the Interim Constitution) to practice their religion. However, to allow harmful drugs to be used by certain people for religious purposes would impair the State's ability to enforce its drug legislation. Dissenting judgments were put forward by Ngcobo J with Sachs J, Mokgoro J and Madlanga AJ concurring, in which it was argued that the regulation of cannabis for religious purposes would not unduly burden the state. Sachs J, with Mokgoro J concurring, put forward an additional separate dissent in which he added 'some observations of a general kind'.

The separate dissenting judgement of Sachs J in the *Prince* case clearly illustrates his awareness of the needs of the religious 'other'. He emphasises the vulnerability of Rastafarians – their 'experience of otherness'[110] in comparison to mainstream religions. He emphasises the dignity and vulnerability of the Rastafarians over expediency, obliging 'the State to walk the extra mile'[111] to meet its obligation to respect difference.

Once again it is notable that Justice Sachs in the dissenting judgments in *Lawrence* and *Prince,* as he had in the dissents in *Harksen, Volks v Robinson* and *Jordan,* uses 'intrusions' of difference, which he through accumulation and interconnectivity continuously refers to, and so brings about a gradual introduction of diversity which ultimately leads to a whole hearted acceptance of the other in the jurisprudence of the court. In these dissenting judgments he reinforces a language of the celebration of 'the right to be different' in the following manner:

> Given our dictatorial past in which those in power sought incessantly to command the behaviour, beliefs and taste of all in society, it is no accident that the right to be different has emerged as one of the most treasured aspects of our new constitutional order.[112]

It is evident that Justice Sachs has continued to weave his voice of dissent, dismantling stereotypes of gender and religious belief, which have traditionally placed certain preferred or acceptable family relationships or religious beliefs in

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[108](N 25).

[109]*Prince v President of the Law Society of the Cape of Good Hope* 1998 8 BCLR 976 (C) for the decision of the Cape Town High Court dismissing the application for setting aside the decision of the Law Society of the Cape of Good Hope. On appeal to the Supreme Court of Appeal confirming the decision of the High Court, see *Prince v President of the Law Society of the Cape of Good Hope* (220/98) [2000] ZASCA 172 (2000-05-25).

[110](N 25) para 157.

[111]*Id* para 149.

[112]*Id* para 170.

a position of superiority in relation to others. In time, however, his voice of dissent has resounded in his concurring and leading judgments. In this manner Sachs has gradually through the accumulation and interconnectivity of small introductions of the right to be different, paved the way for a grand acceptance of the right to be different. This grand acceptance of the right to be different was achieved through his weaving of the right to be different into the concurring and leading judgments which will be discussed next.

The concurring and leading judgments of Justice Sachs

The purpose of the above analysis of the dissenting judgments of Sachs J in the gender equality and freedom of religion cases was to illustrate the manner in which his voice of dissension, through creative design, has reinforced the language of the right to be different. This thread of the right to be different has been able to bring about an alternative point of view in the opinions and judgments of more conservative judges. The dissenting voice of Justice Sachs, first found in his dissenting judgments has, over time, steadily been applied in his concurring judgments. Therefore, in addition to the dissenting judgments discussed above, Justice Sachs' concurring judgments in matters of gender equality will also analysed, in particular the concurring judgment in the *National Coalition I* case.[113]

Furthermore, the relevant leading judgments written by Justice Sachs that pertain to gender equality in the *Fourie* case[114] and to religion in the *Christian Education* case[115] will be analysed. The aim of this analysis is to illustrate how Justice Sachs has continued to weave this golden thread of the 'right to be different' through his leading judgments in the jurisprudence of the Constitutional Court, culminating ultimately in the grand acceptance of the right to be different so vividly displayed by the majority decision in the matter of *Pillay.*[116]

National Coalition for Gay and Lesbian Equality v Minister of Justice (National Coalition I)

The first applicant, the National Coalition for Gay and Lesbian Equality, an association representing gay, lesbian, bisexual and transgendered people in South Africa, made an application to the Constitutional Court for a confirmation

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[113]*National Coalition I Case* (n 13) .
[114]*Minister of Home Affairs v Fourie* (n 13).
[115]*Christian Education v Minister of Education* (n 13).
[116]*MEC KwaZulu-Natal v Pillay* (n 72) Moseneke DCJ, Madala J, Mokgoro J, Navsa AJ, Ngcobo J, Nkabinde J, Sachs J, Skweyiya J and Van der Westhuizen J concur in the judgment of Langa CJ. Separate dissent by O'Regan J.

of an order of the High Court[117] in terms of which the sodomy laws[118] were held to be constitutionally invalid, in that these laws unjustifiably infringed on the right to equality, the right to human dignity and the right to privacy.

In a unanimous judgment written by Ackermann J, all orders of the High Court were confirmed as well as the order that declared the common law offence of sodomy was unconstitutional. In this judgment the thread of the right to be different, so eloquently woven by Justice Sachs in the dissenting judgments, is clearly visible. The right to be different or to be other as stereotypically affirmed is incorporated in the decision of Ackermann J in that he held that:

> To understand 'the other' one must try, as far as is humanly possible, to place oneself in the position of 'the other'.[119]

Justice Sachs in the separate concurring judgment also highlights that substantive equality includes the right to be different in that he states that:

> Equality means equal concern and respect across difference. It does not pre-suppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour but an acknowledgment and acceptance of difference.[120]

The unanimous judgment of Ackerman J refers to the discrimination caused by the application of stereotypical patriarchal conservative morality identified by Sachs in his dissenting judgments in *Lawrence* and *Harksen*:

> The discriminatory prohibitions on sex between men reinforces already existing societal prejudices and severely increases the negative effects of such prejudices on their lives.[121]

Justice Sachs too, in the separate concurring judgment, makes use of the opportunity to accentuate how the Calvinist and conservative public morality of yesteryear, which classified people as 'living in sin',[122] has been used to stereotype people as 'tainted' or marked with 'deviance and perversity' when:

> [E]verything associated with homosexuality is treated as bent, queer, repugnant or comical ...[123]

Through applying this interpretation of the right to equality that does not require uniformity but 'equal respect across difference,' it has been contended that Sachs strives to challenge the power structures underpinning the heterosexual model of

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[117] *National Coalition I Case* (n 13) .
[118] Sodomy laws of s 20A of the Sexual Offences Act, the inclusion of sodomy as an item in Schedule 1 of the Criminal Procedure Act and the inclusion of sodomy as an item in Schedule to the Security Officers Act.
[119] (N 13) para 22.
[120] *Id* para 132.
[121] *Id* para 23.
[122] *Volks NO v Robinson* (n 25) para 218.
[123] *National Coalition for Gay and Lesbian Equality v Minister of Justice* (n 13) para 109.

normalcy by providing a conception of equality as respect for difference.[124] This interpretation of the right to equality as put forward by Sachs J ultimately leads to his claim for a 'right to be different' when he continues as follows:

> The Constitution acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation.[125]

This article contends that through these dissenting and concurring judgments, Justice Sachs has paved the way for a more inclusive jurisprudence of the Court which is more sensitive to the rights of the those that experience 'otherness'.[126] This inclusive jurisprudence is echoed by the unanimous decision of Ackermann J in the *National Coalition I* case.[127]

It is further interesting to note how Justice Sachs in his leading judgments continues to weave the same threads of interpretation that he wove into the fabric of his concurring and dissenting judgments. It can be argued that in this manner the once dissident voice has been brought into the choir of leading voices. Further evidence of the more inclusive jurisprudence reflected in Sachs' leading judgments on gender equality and the right to freedom of religion will be discussed.

Leading judgments

Minister of Home Affairs v Fourie

The applicants were partners in a permanent same-sex relationship from June 1994 and they argued that the common law definition of marriage as a legal union of a man and a woman for the purpose of a lifelong mutual relations, together with the formula dictated in the Marriage Act 25 of 1961 which requires the couple to state that they are contemplating a marriage between a male and a female to the exclusion of others, discriminated unconstitutionally against homosexual persons. The Court unanimously held that the common law definition of marriage was unconstitutional in that it discriminated against homosexual couples. Regarding the appropriate remedy, the majority per Sachs J, held that a legislative remedy would render the development of the common law unnecessary. O'Regan J agreed with the finding of unconstitutionality, but held that this Court should develop the common law and at the same time read in the words 'or spouse' to section 3(1) of the Act, permitting same-sex couples to marry with immediate effect.

Justice Sachs' clearly weaves the golden thread of the 'right to be different' into the leading judgment in the *Fourie* case, by first referring to his dissenting judgment in *Lawrence*, later confirmed in the leading judgment in *Christian Education*:

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[124](N 15) 328.
[125]*National Coalition 1 Case* (n 13) para 135.
[126]*Prince v President of the Law Society of the Cape of Good Hope* (n 25) para 157.
[127]Chaskalson P, Langa DP, Goldstone J, Kriegler J, Mokgoro J, O'Regan J and Yacoob J all concur in the judgment of Ackermann J, separate concurrence by Sachs J.

> As was said by this Court in *Christian Education* there are a number of constitutional provisions that underline the constitutional value of acknowledging diversity and pluralism in our society, …, and highlight the importance of individuals and communities being able to enjoy what has been called the 'right to be different' (footnotes omitted).[128]

Not only does Sachs introduce his own voice of discord, but he amplifies the voice of difference through his referral to his previous separate concurring judgment in the *National Coalition I* case:

> Although the *Sodomy* case, which was the first in the series, did not deal with access to marriage as such, it highlighted the seriously negative impact that societal discrimination on the ground of sexual orientation has had, and continues to have, on gays and same-sex partnerships.[129]

In addition, Justice Sachs incorporates the single judgment of Justice Ackerman in the *National Coalition I* case in his majority judgment in the *Fourie* case as follows:

> This Court stated later in the *Home Affairs*[[130]] case dealing with same-sex immigrant partners that although the main focus of the *Sodomy* judgment was on the criminalisation of sodomy …. The sting of past and continuing discrimination against both gays and lesbians was the clear message that it conveyed, namely, that they, whether viewed as individuals or in their same-sex relationships, did not have the inherent dignity and were not worthy of the human respect possessed by and accorded to heterosexuals and their relationships. It denied to gays and lesbians that which was foundational to our Constitution and the concepts of equality and dignity, which at that point were closely intertwined, namely that all persons have the same inherent worth and dignity as human beings, whatever their other differences may be.[131]

This process of interweaving culminates in the *Fourie* case when Justice Sachs draws all the threads, in the cases discussed above, together under the overarching concept of 'the right to be different' when he in appeals for the celebration of difference in the following way:

> A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. To penalise people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference. At the very least, it affirms that difference should not be

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[128] *The Minister of Home Affairs v Fourie* (n 27) 61.
[129] *Id* 49.
[130] *Ibid.*
[131] *Id* 50.

> the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society (footnotes omitted).[132]

This bold call for acknowledgement and acceptance of difference and the celebration thereof is also repeated in the leading judgment the *Christian Education* case.

Christian Education South Africa v Minister of Education

In the *Christian Education* case, section 10 of the Schools Act 84 of 1996, outlawing corporal punishment in schools, was challenged on the basis that the prohibition infringed individual religious beliefs as protected in terms of section 15 of the Constitution as well as the community rights of Christian parents as entrenched in section 31 of the Constitution. The court in a unanimous decision found that the prohibition indeed did limit individual and community rights, but that the limitation is, however, justified.

In the leading judgment of Sachs J in the *Christian Education* case, he refers to the right to be different in the following manner:

> There are a number of other provisions designed to protect the rights of members of communities. They underline the constitutional value of acknowledging diversity and pluralism in our society …. Taken together, they affirm the right of people to be who they are without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the 'right to be different'. In each case, space has been found for members of communities to depart from a general norm. These provisions collectively and separately acknowledge the rich tapestry constituted by civil society, indicating in particular that language, culture and religion constitute a strong weave in the overall pattern (footnotes omitted).[133]

Justice Sachs' voice of dissension, has been woven not only in his dissents but also in his concurring and leading judgments, ultimately this alternative point of view has been carried forward in the mindset of the other judges. The emphasis on the dignity and vulnerability of the 'other' in the dissenting, concurring and leading judgments of Sachs has paved the way forward for a more inclusive jurisprudence regarding the protection of religious difference as seen, in particular, in the recent decision of *Pillay.* The celebration of the right to be different is reverberated by the full orchestra playing this note in union.

Full choir

MEC for Education: KwaZulu-Natal v Pillay

Sunali Pillay, a girl from a South Indian family, had her nose pierced in accordance with a time-honoured family tradition aimed at honouring daughters as young

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[132] *The Minister of Home Affairs v Fourie* (n 27) 60.
[133] (N 27) para 24.

adults.[134] However, the headmistress of Durban Girls High, the school which Sunali attended, informed Sunali that she was not permitted to wear the nose stud as it was in contravention with the school code.[135] Ms Pillay (Sunali's mother) wrote to the Department of Education (DE) to request clarity on its position and was subsequently informed that the DE supported the School's approach. The School decided that if Sunali did not remove the nose stud she would face a disciplinary tribunal. Before the tribunal could hear the matter, Ms Pillay referred the matter to the Equality Court. The Equality Court held that although a *prima facie* case of discrimination had been made out, the discrimination was not unfair, as the Code had been drawn up in consultation with the learners, representative council, parents and the governing body. The Equality Court accepted the purpose of the Code as being 'to promote uniformity and acceptable convention amongst the learners'. The decision by the Equality Court was taken on appeal to the Pietermaritzburg High Court[136] which held that the conduct of the School was indeed discriminatory and unfair in terms of the *Equality Act* and that there were less restrictive means to achieve the objectives of the School Code. On Appeal to the Constitutional Court by the DE and others, the Constitutional Court was faced with the question of whether the effect of the Code was discriminatory. The Court in the majority decision of Langa J[137] held that the Code was discriminatory in so far as:

> The norm embodied by the Code was not neutral, but enforces mainstream and historically privileged forms of adornment, such as ear studs, … at the expense of the minority and historically excluded forms. [Further continuing] It thus places a burden on learners who are unable to express themselves fully and must attend school in an environment that does not completely accept them.[138]

The right to be different, constantly stipulated by Sachs in his dissenting, concurring and leading judgments, is embraced by Langa J, when he states:

> The protection of voluntary as well as obligatory practices also conforms to the Constitution's commitment to affirming diversity. It is a commitment that is totally in accord with this nation's decisive break from its history of intolerance and exclusion. Differentiating between mandatory and voluntary practices does not celebrate or affirm diversity, it simply permits it. That falls short of our constitutional project which not only affirms diversity, but promotes and celebrates it. We cannot celebrate diversity by permitting it only when no other option remains.[139]

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[134](N 24) para 7.

[135]Jewellery: Ear-rings – plain round studs/sleepers may be worn, ONE in each ear lobe at the same level. No other jewellery may be worn, except a wristwatch. Jewellery includes any adornment/bristle which may be in any body piercing. Watches must be in keeping with the school uniform. Medic-Alert discs may be worn.

[136]*Pillay v MEC for Education, KwaZulu-Natal* 2006 6 SA 363 (EqC), 2006 10 BCLR 1237 (N).

[137]Moseneke DCJ, Madala J, Mokgoro J, Navsa AJ, Ngcobo J, Nkabinde J, Sachs J, Skweyiya J and Van der Westhuizen J concurring.

[138](N 24) para 44.

[139]*Id* para 64.

It has been suggested that the decision in *Pillay* was 'inspired' by a 'jurisprudence of difference' which affirms and celebrates difference.[140] This article contends that the 'jurisprudence of difference' was indeed created by the unique design of the judgments of Justice Sachs. This tapestry of inclusion was crafted by his weaving the image of difference into, at first, his dissenting judgments, expanding thereafter, into his concurring judgments, and over time, culminating in his leading judgments.

In conclusion, the 'right to be different' as introduced in the *Lawrence* case and argued for in the dissenting judgment of Sachs in the *Prince* case has come full circle and as a result the 'right to be different' is truly celebrated in the jurisprudence of the Constitutional Court as seen in *Pillay.* Justice Sachs has innovatively employed the rhetoric of power, which he so aptly identified in the dissents in the *Harksen* and *Volks v Robinson* cases, namely that 'trivial intrusions' of discrimination and inequality, through accumulation and interconnectivity bring about the grand exercise of power'. He similarly wove the language of difference at first into his dissenting judgments – a preliminary intrusion. This was reinforced in his concurring judgments where he uses accumulation and interconnectivity, and finally in his leading judgments in a grand exercise of power.

Thus, he has brought about a splendid acceptance of diversity and has created a true celebration of 'the right to be different' which has come to be reflected, ultimately, in the judgments of the Constitutional Court. The jurisprudence of the court as a result of the creative design of Justice Sachs is indeed reflective of the richness of diversity present in South Africa.

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[140]Du Plessis 'Religious freedom and equality as celebration of difference: A significant development in recent South African Constitutional case law' (2009) 12/4 *Potchefstroom Electronic Law Journal* (*PER*) 26.