

# The 'archaic structures of our desire'

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## Introduction

What I am interested in and what I want to argue for in this piece is what Drucilla Cornell, following Jacques Derrida, calls 'an alternative ethic of love'.<sup>1</sup> The failure of love or 'love's failure'<sup>2</sup> will be taken as a reason for the persistence of violations, exclusions, inequality, discrimination and injustice in private and public lives, and in a more abstract sense also for the failure of politics, friendship and the law. The philosophy of deconstruction and specifically the work of Jacques Derrida do much to expose the persistence of phallogocentrism – the centrality of maleness – in the philosophy of ideas and in ordinary life, in what we tend to regard as natural in our deepest desire. For Derrida, phallogocentrism must be challenged not only through writing and thinking, but also by how we live, and how we are influenced by the unconscious. It is necessary to quote Derrida at length:

This requires one kind of courage. Another kind ... has to do with reading, thinking and doing justice to a concept, and so on, doing the work, the homework, with concepts: an infinite, endless task. This too requires courage. But I was thinking of yet another kind of courage and it is needed here. It has nothing to do with social hegemony or resistance, nor with concepts in their philosophical, theoretical, or speculative form. It has to do with our own psychological, phantasmatic, archaic structures.

To ask such questions, such difficult questions, requires that we change the most resistant, protected, archaic structures of our desire. If I say I am no longer a 'phallogocentric' thinker or writer and make this claim publicly in verbal statements and published texts, while I remain on another level, under the speculative layer, caught up in the phallogocentric structures of my own desire, of my own relationship with others, then nothing has changed. But in order to ask the question, to have the motivation, the energy, the clarity to read texts differently and to resist hegemony in society, you have to work from the inside out. ... If you don't do this kind of homework in life, day and night, with every member of the

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<sup>1</sup>Cornell 'The shadow of heterosexuality' (2007) *Hypathia* 22 229-242.

<sup>2</sup>Cornell (n 1) 236. See also Davis '(Love is) the ability of not knowing: Feminist experience of the impossible in ethical singularity' (2002) *Hypatia* 17 145-161.

family and with those outside the family, if you don't work in order to change your phantasmatic or psychological, unconscious approach to these problems, you won't change anything and probably won't find the necessary social courage and the theoretico-philosophical courage to address these questions.<sup>3</sup>

Following Derrida's reference to the unconscious above I will draw on Cornell's discussion of Lacan below. I will also consider Derrida's proposal of 'lovance' that Cornell explains as a 'rewriting of moral sovereignty'—something that could disclose 'an [alternative] ethic of love'.<sup>4</sup> The reflection on the lack of love, phallogocentrism and the possibility of an alternative ethic of love will provide a space from where I will look at how Constitutional Court Judge Albie Sachs in some of his decisions and writings addressed the archaic structures of our desire – to what extent did he, when thinking about and deciding on issues of power, equality, relationships and justice challenge those 'desired certainties' perceived in life and law as 'natural'.<sup>5</sup>

These questions will take one further step by recalling the problematisation of a civic republican and, to a certain extent, US Critical Legal Studies' acceptance of politics founded by law (or a constitution) as politics, without noting the reduction and stilling of politics taking place in that move.<sup>6</sup> The comparison made between law, marriage, politics and love will be drawn on – simply put, the argument tentatively made by Emiliios Christodoulidis is that as law will always leave us with a reductive notion of politics, so will marriage leave us with a reductive notion of love, in both cases an absence or impossibility of reflexivity in law and marriage is what is at stake.<sup>7</sup> By enquiring into love itself, and the lack of love, I want to interrogate also the dichotomies of love/marriage, politics/law and argue that we do not only have reductive notions of love and politics within the limited structures of marriage and law, but that love and politics themselves are caught up in archaic desires that reduce, still, limit, exclude and violate. After all of this we could ask if there are possibilities of not only an alternative ethic of love, but also an alternative ethic of law or at least an alternative jurisprudence. Relating notions coming from multiple and divergent spaces might disclose some traces. These notions are the feminist slogan of 'the personal is the political'; the Derridean notions of friendship, politics and democracy and what Patricia Williams refers to as a 'jurisprudence of generosity'.<sup>8</sup> An alternative ethic of

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<sup>3</sup>Derrida 'Opening plenary: Is feminist philosophy philosophy?' in Bianchi (ed) *Is feminist philosophy philosophy?* (1999) 27 as quoted by Cornell (n 1) 237-238.

<sup>4</sup>Cornell (n 1) 238. See also Barnard-Naudé 'Beyond the brother: Radical freedom' (2008) *Acta Juridica* 273 at 292-295.

<sup>5</sup>Cornell (n 1) 237.

<sup>6</sup>See, eg, Christodoulidis 'Self-defeating civic republicanism' *Ratio Juris* (1993) 6 1 64-85 and 'A new constitutional reality for civil society? Some cautionary remarks on republican citizenship' in Bellamy et al (eds) *Democracy and constitutional culture in the union of Europe* (1995) 177-196.

<sup>7</sup>Christodoulidis 'Love, law and the contestability of European community' in Petersen (ed) (1998) *Law and love in Europe* 52-61.

<sup>8</sup>Williams *The alchemy of race and rights* (1991) 8. See also Van Marle 'Laughter, refusal, friendship: Thoughts on a jurisprudence of generosity' (2006) *Stellenbosch LR* 194-206

love might entail a reconciliation of sorts – a reconciliation between the sexes and the genders, a reconciliation between heterosexuality and homosexuality, the kind of reconciliation that Cornell and Thurschwell describe as 'the coincidence of love and freedom'.<sup>9</sup>

The argument will unfold as follows: I look firstly at the troubled history of love, with specific attention to heterosexuality, heteronormativity and patriarchy. Secondly, I consider the possibility of a different history, aimance/lovance and an alternative ethics of love; and thirdly, I reflect on a few judgments by Constitutional Court Justice Albie Sachs. Fourthly, the possibility of a reflexive law or indeed the alchemy of life and law, politics and law, love and marriage is posed.

## Troubled histories

Drucilla Cornell, in a response to the renewed attack on the civil rights of gay, lesbian and transgendered people in the United States of America, makes a powerful argument on why heterosexism finds it necessary to reinstate itself with such force. She titles her piece, 'The shadow of heterosexuality' and explains the lack of *heterosexuality* as a reason for *heterosexism*. In putting forward the idea of ethical feminism Cornell has strongly relied on deconstruction, and on working towards a 'new choreography of sexual difference'.<sup>10</sup> Ethical feminism relies on a strong alliance between feminism and deconstruction that, to use Cornell's words, 'puts a twist on [her] use of Lacan'.<sup>11</sup> According to Cornell's reading of Lacan his theory makes heterosexual love impossible – a complementary relationship between man and woman is impossible because of the impossibility for the feminine to be symbolised within the order of sexual difference. If – to use the famous phrase – 'woman does not exist' how can there be a heterosexual relationship between man and woman? Because of woman's lack of representation all we have is the play of fantasy. Although Cornell has done much to counter Lacan on this issue she follows him here insofar as his thoughts assist in exposing what could be seen as 'the loss of the heteros within heterosexuality'.<sup>12</sup>

Cornell argues that because of the experience of the seeming 'impossibility of love', specifically the impossibility of love between a man and a woman, heterosexual love, we find a 'nostalgia' for even more traditional versions of heterosexual relations and the need to reject love between same-sex/homosexual couples. Although Cornell differs from Lacan as regards psychoanalytical theory she believes that he manages to capture something 'on a deeper level in that he

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<sup>9</sup>Cornell and Thurschwell 'Feminism, negativity, subjectivity' in Benhabib and Cornell *Feminism as critique* (1987) 161. See also Klein *Love, guilt and reparation* (1964).

<sup>10</sup>Cornell (n 1) 229; see also *Beyond accommodation* (1999).

<sup>11</sup>Cornell (n 1) 235.

<sup>12</sup>*Ibid.*

expresses the symptom of love's failure'.<sup>13</sup> She concedes that this might be overstating it, but argues that we need to consider the insistence on certain patriarchal, heteronormative, heterosexist and stereotypical behaviour as an attempt to save a certain idea of love. Quite paradoxically this patriarchal, heteronormative insistence makes heterosexual love impossible because of the absence of exactly the heteros, the difference between two people. Instead of allowing love, rigid gender identities are constructed and enforced, denying singularity and the possibility of being loved as oneself.<sup>14</sup> Johan van der Walt has made a similar argument following Jean Luc Nancy, making the distance between two people a necessity for the possibility of touching, indeed arguing that, without the distance that enables touching, being together for two people is not possible.<sup>15</sup>

Central in the work of Cornell is her notion of the 'imaginary domain' developed in a book published in 1995.<sup>16</sup> The imaginary domain is defined by Cornell as 'the moral and psychic space we all need in order to come to terms with who we are as sexuate beings and to have the chance to claim our own person as a sexuate being'.<sup>17</sup> The imaginary domain is a powerful notion with which to challenge the limits of formal equality, and I think also substantive equality. A significant feature of the imaginary domain is the shift to freedom, the freedom of each and every person to work out for her/himself who s/he is sexually and how s/he wants to live her/his life. The imaginary domain was initially developed by Cornell to expose the exclusion of gay men, lesbians and transgender people from the protection of formal equality. But it also exposes the limits of formal law to protect heterosexual women and men who cannot live within the rigid confines of patriarchy and heteronormativity. Cornell developed what she calls 'the degradation principle', which means that no one should 'be degraded from claiming her equal status as a person because she expresses her love differently from accepted cultural norms' or by openly defying rigid gender stereotypes.<sup>18</sup>

Relying on Lacanian psychoanalysis Cornell explains the trauma endured by any person who is subjected to the imposition of heterosexist norms on the imaginary. Briefly and reductively the explanation goes as follows: No one owns or controls her own body, how we understand the body is part of a struggle in which we attempt to see ourselves as beings with bodily integrity. For Lacan and before him Freud, in order to prevent psychosis we need to have a sense of bodily integration/wholeness – 'a body that is one with ourselves'.<sup>19</sup> This projection must

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<sup>13</sup>*Id* 236.

<sup>14</sup>*Ibid.*

<sup>15</sup>Van der Walt *Law and sacrifice* (2005) 252; See also Nancy *Being singular plural* (2000). Van der Walt draws on Jonker *Versamelde werke* (1994).

<sup>16</sup>*The imaginary domain* (1995).

<sup>17</sup>Cornell (n 1) 230; Cornell (n 16).

<sup>18</sup>Cornell (n 1) 232. See also Cornell (n 16) and *At the heart of freedom* (1998).

<sup>19</sup>Cornell (n 1) 233.

be future orientated and the subject is thus constituted by the primary caretaker who will continuously confirm the vision of bodily integrity. Cornell explains this somewhat abstract idea with the example of a parent encouraging an infant who is making his/her first steps by saying 'You see, you are a walker'. It is through the eyes, the projection of the parent that the child is confirmed in what she or he might become. It is through this process of mirroring that the child becomes an adult, and starts to develop an identity. As Cornell explains: 'The life of the body depends on the future anteriority of the projection of what is yet to be, imagined as already given'.<sup>20</sup> It is important to note that this process is not one of actual mirroring, but an imagined, fictional anticipated, future-orientated unity associated with bodily integration/wholeness.

Cornell recalls Judith Butler's significant work on gender as 'troubled', in which she explained gender as the result of many performances of gender.<sup>21</sup> Gender is troubled because gender is performed within the confines of rigid gender identities and expectational norms. Cornell emphasises how rigid gender identities make the possibility of imagining one's sexuality freely impossible. This has traumatic consequences for gay men, lesbians and transgender people, but also for women and men who cannot identify with the imposed norms of patriarchy and heterosexism.

In arguing for ethical feminism, Cornell has continuously put forward a feminism that challenges any account of what woman or man is. By affirming sexual difference and the feminine within sexual difference she defies any theory and any legal protection that will exclude and violate radical difference. Her reliance on deconstruction and specifically, following Derrida, the call for a new choreography of sexual difference opens the possibility of alternative ways of living with each other, of bringing forward an alternative ethic of love.

## A different kind of history

In *The politics of friendship* Derrida exposes the betrayal of 'democratic equality' by exposing how all friendships turn on exclusion.<sup>22</sup> All friendships in fact become nothing but relations of fraternity – 'naturalized friendship'.<sup>23</sup> Derrida is concerned with the possibilities of moving beyond the logic of fraternisation and, as Thomson notes, with the question of what kind of political thought can be organised around the category of friendship.<sup>24</sup> What are the implications of the impossibility of equal friendships for the concern in this paper, namely relationships of love between people? For Derrida, responsibility and judgment come into play only where one

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<sup>20</sup> *Ibid.*

<sup>21</sup> *Id* 234; Butler *Gender trouble. Feminism and the subversion of identity* (1999).

<sup>22</sup> Derrida *The politics of friendship* (1997).

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid*; Thomson *Deconstruction and democracy* (2005) 12.

is beyond the predictable workings of a specific programme or rule. Fraternity is then nothing but the becoming irresponsible of friendship. Friendship based on a natural bond or allegiance amongst brothers disables responsibility.<sup>25</sup> Similarly friendships and relations grounded in fixed sex/gender identities amount to irresponsible friendship, making friendship and love impossible.

A crucial issue in *The politics of friendship* is the question of the 'sister'.<sup>26</sup> If all friendships become fraternity – a brotherhood amongst men – what does this say about the friendship amongst women, and between men and women? Women face a double exclusion – they are absent, excluded by a hegemonic discourse that recognises only the same; when recognised they are instantly neutralised, generalised, humanised. How can women prevent this? Does not every act of addressing inequality at the cost of reducing oneself to the hegemonic yardstick reduce the sister to a brother? Derrida names two options: 1) displace politics and accordingly equality altogether; 2) keep the name of politics and accordingly equality, but analyse the logic and disrupt it from within.<sup>27</sup> And of course for Derrida there is no choice – as in other examples he holds on to a double strategy. He introduces the notion of 'aimance' (lovance), which could be understood as an experience of friendship between active and passive. He identifies two contradictory moments of friendship, the one being the possibility of having many friends with whom I am in no relation yet, active or passive; the other being the moment where I betray the possibility of having many friends by preferring certain friends and excluding others.<sup>28</sup>

I have referred to Derrida's concern with deconstructing phallogocentrism, a male-centred way of thinking, writing and living. In exposing and deconstructing this male centrality we might find an opening for another voice, the demand of the other that could lead to another moral law, what Cornell calls a 'rewriting of moral sovereignty'.<sup>29</sup> Cornell argues:

In lovance Derrida risked the rethinking of a moral decision, but in a way that might approximate an ethics of love. What might be demanded of us if we were to try to be faithful to love? Love inevitably requires of us openness to our responsibility to others. It therefore has an ethical dimension to it.<sup>30</sup>

Lovance relates to the argument on the lack of heterosexual love in the sense that it opposes the notion of rigid identity by which difference, the heteros, is prevented. To truly love another person the archaic structures of our desire must be confronted, that what seems natural questioned, fixed certainties

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<sup>25</sup>Thomson (n 24) 16. See also Thomson 'What's to become of "democracy to come"?' (2005) 15 *Postmodern culture* 1.

<sup>26</sup>Derrida (n 22) 271-306.

<sup>27</sup>Derrida (n 22). See also Thomson (n 24) 22.

<sup>28</sup>Thomson (n 24) 15.

<sup>29</sup>(N 1) 238.

<sup>30</sup>*Ibid.*

displaced. This is true for our capacity to love as gay men, lesbians, transgender people and heterosexual women and men. It is not about arguing for either homosexuality or heterosexuality but against *heterosexism*.

We could concede with Cornell that the loss of fixed identities might bring about uncertainty and even panic that could result in the vehement search for rigid control over the sexual identity, freedom and equality of people. Cornell recalls Herbert Marcuse's resistance against what he called 'repressive tolerance'.<sup>31</sup> For Marcuse the seeming freedom of capitalism that resulted in the idea that everything and everyone could be bought, that 'anything goes' and that 'all is about me' is as far as freedom as one could get. Within dominant strands of liberalism and late capitalism one can understand why some people are grasping for more certainty and accordingly conservative notions of sexuality and rigid gender identities. Cornell's important move here is to show that what many people perceive as 'decadence' is rather the result of a culture of liberalism in advanced capitalism in which sexual freedom is caught up in the 'larger capitalist machinery'.<sup>32</sup> For Derrida the deconstruction of gender identity should not lead us to a repressive tolerance of 'anything goes' but could open us to an alternative ethics of love. Lovance could act as a limit of a different kind, and also a different kind of history: 'the possibility of rethinking sexuality as sexual difference itself'.<sup>33</sup> To quote Derrida:

There may be a way to think about history, a hidden kind of history, in which sexual difference is not determined as a war, as a conflict, a duel between two parties. This hidden history is a history; it has a history.<sup>34</sup>

For Cornell, Derrida's words above are significant because they show that the resistance to the duality of gender is linked to the struggle for a different history. This struggle takes place in the name of lovance – the search for an alternative ethic of love. In deconstructing rigid identities we might lose certain securities. However, we might also gain exactly what is seemingly absent as a result of heterosexism, namely heterosexual love. As I alluded to earlier, I want to extend the argument and contemplate also the implications of an alternative ethic of love for politics, democracy and jurisprudence.

## Love in the time of Albie Sachs

I turn now to a few selected decisions by Albie Sachs. I am merely looking for traces, hints that could disclose possibilities for an alternative ethics of love. I focus on judgments concerning equality and discrimination on account of sex/gender (*Harksen and Jordan*),<sup>35</sup> sexual orientation (*National Coalition* and

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<sup>31</sup>*Id* 239.

<sup>32</sup>(N 1) 240.

<sup>33</sup>*Ibid*.

<sup>34</sup>Derrida (n 3) 12 as quoted by Cornell (n 1) 240.

<sup>35</sup>*Harksen v Lane* NO 1997 11 BCLR 1489 (CC); *S v Jordan* 2002 6 SA 642 (CC).

*Fourie*),<sup>36</sup> and marital status (*Volks*).<sup>37</sup> I add a few judgments that do not fall within the categories of equality, but that illuminate something about Sachs' approach to law, democracy and justice (*PE Municipality* and *Dikoko*).<sup>38</sup> The main idea that I would like to draw on from these judgments is how all of them play an enabling role in the creation of independence, freedom, care, love, democracy and friendship.

### ***Enabling independence in Harksen***<sup>39</sup>

*'In sickness and in health not in solvency and insolvency'*

In this case the plaintiff argued that section 21 of the Insolvency Act, which stipulated that the estates of spouses merge in a case of one partner's insolvency, violated amongst others the equality guarantee in section 8 of the interim Constitution. The majority of the Court found that the section does not violate the equality provision. Sachs, in a minority judgment, argued that the section affronts the personal dignity of persons involved in a marital relationship and perpetuates an archaic vision of marriage. He found that the section was patriarchal in origin, promoting a concept of marriage in which, independently of the living circumstances and careers of the spouses, their estates merged. The underlying premise of this section is that 'one business mind is at work in marriage, not two.' Sachs described this section as reinforcing a stereotypical view of marriage, which, in light of the values of the constitution, is demeaning to both spouses.

### ***Enabling freedom: The case of sex work in Jordan***<sup>40</sup>

*'The element of gender is not just happenstance, but integral to the prohibited conduct and constitutive of the way it is treated by the law, enforcement agents and society'*

On 20 August 1996 a police officer entered a brothel in Pretoria and paid R250 for a pelvic massage, whereafter arrests were made on the grounds of contravention of the Sexual Offences Act 23 of 1957, which criminalises providing sex for reward and brothel-keeping. The arrested sex workers argued that certain sections of the Act were unconstitutional, because they amounted to unfair discrimination on sex/gender grounds, because only the acts of sex workers were criminalised but not the acts of customers. The High Court held that section

<sup>36</sup>*National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC); *Minister of Home Affairs v Fourie* 2006 1 SA 542 (CC).

<sup>37</sup>*Volks v Robinson* 2005 5 BCLR 446 (CC).

<sup>38</sup>*Port-Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); *Dikoko v Mokhatla* 2006 6 SA 235 (CC).

<sup>39</sup>*Harksen v Lane* (n 35).

<sup>40</sup>*S v Jordan* (n 35).



20(1)(aA) of the Act, which penalised sex for reward, and sections 2, 3(b) and 3(c) of the Act (the brothel provisions) were unconstitutional. The matter was referred to the Constitutional Court for confirmation. The majority of the court rejected the decision taken by the High Court on the grounds that the specific sections of the Act were not unconstitutional. Sachs J and O'Regan J, in a minority judgment, differed and found these sections to be of a discriminatory nature. In their judgment they noted that 'the element of gender is not just happenstance, but integral to the prohibited conduct and constitutive of the way it is treated by the law, enforcement agents and society.'<sup>41</sup>

### *Enabling love: National Coalition and Fourie*<sup>42</sup>

*'While recognising the unique worth of each person, the Constitution does not presuppose that a holder of rights is as an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that people live in their bodies, their communities, their cultures, their places and their times. The expression of sexuality requires a partner, real or imagined. It is not for the state to choose or to arrange the choice of partner, but for the partners to choose themselves.'*

In the *National Coalition* case the constitutional court had to decide on the criminality of sodomy. The decision was that the criminalisation of sodomy is unconstitutional, and not true to the values of the Constitution, particularly dignity. Sachs gave a separate judgment in which he concurred with the majority. Significant about his decision is that unlike the decision delivered by Ackerman J he argued for the respect of sexual choice without reading it through a heteronormative lens.

*'Respect for human rights requires the affirmation of self, not the denial of self'. 'It is one thing for the Court to acknowledge the important role that religion plays in our public life. It is quite another to use religious doctrine as a source for interpreting the Constitution.'*

In *Fourie* the court had to decide on the constitutionality of the common law definition of marriage that restricted marriage to heterosexual couples. It was

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<sup>41</sup>A more problematic observation by them is the following: 'By making her sexual services available for hire to strangers in the marketplace, the sex worker empties the sex act of much of its private and intimate character. She is not nurturing relationships or taking life-affirming decisions about birth, marriage or family; she is making money. Although counsel for the appellants was undoubtedly correct in pointing out that this does not strip her of her right to be treated with dignity as a human being and to have respect shown to her as a person, it does place her far away from the inner sanctum of protected privacy rights. We accordingly conclude that her expectations of privacy are relatively attenuated. Although the commercial value of her trade does not eliminate her claims to privacy, it does reduce them in great degree.'

<sup>42</sup>*National Coalition for Gay and Lesbian Equality v Minister of Justice* (n 36); *Minister of Home Affairs v Fourie* (n 36).

decided that this goes against the protection of equality in the constitution and the legislature was given a year to make legislative amendments. As also noted by De Vos and Barnard-Naude,<sup>43</sup> Sachs's decision here could be seen as simultaneously enabling and disabling – he could have immediately read marriage to mean heterosexual and homosexual marriage but preferred to defer to the legislature. However, with both these cases the court took the first steps in exposing and questioning the heteronormativity in what was and still is perceived as neutral common law.

### ***Enabling care: Volks***<sup>44</sup>

*'Should marriage be the exclusive touchstone of a survivor's legal entitlement as against the rights of legatees and heirs?'*

In *Volks* Sachs wrote a striking minority judgment. Faced with the question of the inheritance of the estate of a deceased unmarried partner the majority decided that the partner cannot inherit. Sachs differed from the majority arguing that formal marriage should not be the yardstick but whether the couple shared a life together.

### ***Enabling democracy: PE Municipality***<sup>45</sup>

*'It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when state action intensifies rather than mitigates their marginalization.'*

In the *PE Municipality* case Sachs raised the possibility that important aspects of an eviction dispute could be resolved through a court order telling the parties to negotiate the solution.

### ***Enabling friendship: The case of defamation in Dikoko***<sup>46</sup>

*'Unlike businesses, honour is not quoted on the Stock Exchange'.*

Mr Dikoko, the Executive mayor of the Southern District Municipality in the North West Province, aggrieved at being taken to task about his grossly excessive use of a municipal cellphone, said things about Mr Mokhatla, the municipal manager, that resulted in the latter being awarded an amount of R110 000 on the grounds of defamation. Justice Sachs, in a concurring judgment with Justice Mokgoro, noted the limits of present defamation law in addressing this kind of relation. He argued for developing the common law to make it more consistent with the ethics of the

<sup>43</sup>(2010) 25 SAPL 210.

<sup>44</sup>*Volks v Robinson* (n 37).

<sup>45</sup>*Port Elizabeth Municipality v Various Occupiers* (n 38).

<sup>46</sup>*Dikoko v Mokhatla* (n 38).

new constitutional order, an ethics that could 'facilitate interpersonal repair and the restoration of social harmony'. Sachs argued that the common law protection against defamation amounts to treating a person's reputation and honour – inherent features of a person's dignity – as if these were marketplace commodities. He argued as follows: 'Unlike businesses, honour is not quoted on the Stock Exchange. The true and lasting solace for the person wrongly injured is the vindication by the Court of his or her reputation in the community. The greatest prize is to walk away with head high, knowing that even the traducer has acknowledged the injustice of the slur.'

I have previously reflected on the notion of a jurisprudence of generosity. What lies at the heart of the notion of generosity, for me, is the idea of unexpectedness that breaks with the formality and predictability of law. It is this unexpectedness that could disclose new directions of thinking about and doing law.<sup>47</sup> I will be making an overstatement, if not committing a total misreading of both Sachs and the theories and philosophies drawn on above, if I attempt to claim that Sachs' judgments could be understood as putting forward an alternative ethics of love. However, as the few examples above show, he has been consistently inconsistent with dominant standpoints in responding to issues that are inherently linked to the archaic structures of our desire.<sup>48</sup> In deciding on equality and discrimination in the case of two married persons in *Harksen* he is not prepared to follow the patriarchal view that subordinates the female partner (the wife) to the male (the husband). In the sex worker case he (with O'Regan) dared to name the discrimination on the grounds of sex/gender, thereby challenging the legal claim to a neutral law. In *National Coalition* and *Fourie* heteronormativity was challenged, and in *Fraser and Volks* care was regarded higher than legal exclusion. In *PE Municipality* and *Dikoko* Sachs considered alternative ways in which to address conflict in the lives of members of a post-apartheid society. As we know law enters where there are already broken realities that can never be fixed or recovered in total, and the concern is to find ways of address that could momentarily at least suspend these disruptions rather than furthering conflict.

## Alchemies

Versions of critical legal theory that regard any engagement with law as tainted and that have no belief in law's inherent difference, in other words, that law itself is in a constant rhythm of difference and postponement, will not support my attempt to read in the jurisprudence of Albie Sachs traces that could disclose an alternative politics and ethics. A critique lodged against civic republicanism and to a certain extent US Critical Legal Studies is that by linking politics with law these approaches reduce

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<sup>47</sup>Van Marle (n 8); Williams (n 8).

<sup>48</sup>See also Sachs *The alchemy of life and law* (2009).

politics to what the law allows and that this is an impoverished notion of politics.<sup>49</sup> Taking this to community the argument follows that law, and in particular constitutionalism, also reduces community to law, with the consequence of simplifying it, making it unreflective. Christodoulidis employs a distinction between love and law in order to explain that community, like love, is reflexive while the law is not. For him 'Community comes about around a political/ethical understanding both capable of upholding a commitment, and dynamic, always potentially disruptable internally: and with no measure of authority, force, persuasion and violence capable of upholding it externally'.<sup>50</sup> Christodoulidis associates the reflexive with the horizon of love and the reductive with the horizon of law. Law cannot recognise particularity and will always revert to generality – love is about collective identity, community and commonality. This distinction is also expanded to the difference between a loving and a legal relationship – between love and marriage. To quote: 'Love lies in the promise of future fulfilment, its actual fulfilment signals its end'.<sup>51</sup> Any attempt to institutionalise or legalise permanence will be 'intolerable to love'. The law is all about the settling of contingency, about stilling, about providing some security of expectations. In keeping with Luhman, he names three dimensions in which law's reductions occur: temporal, social and material. Temporally, law reduces uncertainties by providing normative expectations. Socially, law abstracts otherness into an impersonal context and creates a legal personality. Materially, law will focus only on a limited pool of possibilities. These three dimensions capture the tension between love and marriage. In law the legal person's expectation will turn normative with the law providing a remedy; in love the lover has normative expectations that must be fulfilled by the concrete other, the beloved, and in love material thresholds cannot be set, the relation is interpersonal and not impersonal.

I have previously supported the arguments above.<sup>52</sup> My sense now is that the distinctions drawn very much within the tradition of systems theory are too rigid, untenable and ultimately not true of the fusion of amongst other notions love, law, politics and community. What Derrida has shown us on many occasions is that law can be deconstructed.<sup>53</sup> More importantly for my argument, here is the illumination of the inevitable links between love, friendship, politics and democracy. We should note how our understanding of love, our enactment of love, the archaic structures of our desire are still deeply caught up in phallogocentrism. The reflexivity of love

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<sup>49</sup>Christodoulidis (n 6); Law and reflexive politics (1996).

<sup>50</sup>Christodoulidis (n 7) 59.

<sup>51</sup>*Id* 55.

<sup>52</sup>Van Marle 'Love, law and South African community: Critical reflections on "suspect intimacies" and "immanent subjectivity"' in Botha, Van der Walt and Van der Walt *Rights and democracy* (2003) 231-248.

<sup>53</sup>Derrida 'Force of law: The 'mystical' foundations of authority' in Cornell and Rosenfeld (eds) *Deconstruction and the possibility of justice* (1992) 3-67; Cornell *The philosophy of the limit* (1992).

that Christodoulidis relies on is not a given. As we have seen in Cornell's observation of the lack of love, love's failure is how patriarchy and heteronormativity prevent and disallow difference, the heteros that makes love possible. This is consistent with Derrida's work on autoimmunity where he shows how the drive to destroy democracy is at the heart of all democracies.<sup>54</sup> Autoimmunity/democratic suicide refers firstly to the possibility that democracy is always exposed to the risk of an undemocratic party being elected democratically. But, secondly, it refers to the possibility that, because of autoimmunity, democracy may also destruct from within.<sup>55</sup> Thomson defines autoimmunity as follows: 'a term used in the biomedical sciences to describe a phenomenon in which a body's immune system turns on its own cells, effectively destroying itself from within'.<sup>56</sup> He explains that the link between democracy and autoimmunity lies in describing 'a threat to democracy that comes from within rather than from without ... Autoimmunity is the always-possible failure of such a system to distinguish what it protects from what it protects against'.<sup>57</sup> As explained in the discussion of Derrida's notion of friendship above, whenever friendship/democracy is constituted, it excludes, thereby creating not only a particular instance of non-democratic action, but also destroying its own essence, which is precisely not to exclude – destroying, that is, itself. If this argument is extended to heterosexual love we can see that the very being of heterosexual love is threatened from the inside by subsuming heteros, difference, the necessary distance into sameness. A central concern for Thomson is whether Derrida shifted in *Rogues* from his earlier understanding of 'democracy to come'. He interprets Derrida as challenging his own earlier use of democracy, and by extension the use of democracy by all, underscoring democracy's 'hegemony'.<sup>58</sup> For Thomson the implication might be that 'responsible citizenship must mean (at the very least) [that] all those who present themselves as democrats' must be interrogated/deconstructed.<sup>59</sup> Deconstruction, as Derrida has explained, is not a theory, a method or a political programme, but 'a description of 'what happens', 'a sensitivity or patient attention to upheavals and disruptions already underway'.<sup>60</sup> The notion of democracy's disruption from within shows how the blame for the failure of democracy cannot be placed on something outside by drawing on something that seemingly falls outside of democracy itself. Blame must be cast within – those who profess democracy interrogated. Cornell's interrogation/deconstruction of heterosexual love mirrors Derrida's concern with democracy. Lovance/aimance could disclose an alternative ethics of love, political friendship and democracy.

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<sup>54</sup>Derrida *Rogues: Two essays on reason* (2005). See also Thomson (n 25).

<sup>55</sup>Derrida (n 53) and Thomson (n 25) 1-18.

<sup>56</sup>Thomson (n 25) 2.

<sup>57</sup>*Ibid.*

<sup>58</sup>*Id* 4.

<sup>59</sup>*Ibid.*

<sup>60</sup>*Id* 7.

When considering things like love, friendship, politics and democracy and in particular the possibility of more ethical alternatives, a simultaneous consideration of reconciliation becomes a necessity. Louise du Toit has noted the absence of reconciliation between the sexes/genders in a post-apartheid South Africa.<sup>61</sup> For her the continuance of sexual violence and rape against women could be regarded as the result of the lack of reconciliation. She notes how even Derrida in a writing on forgiveness does not deal with it but shifts the issue of rape to a footnote, the margin of his text.<sup>62</sup> I have referred to Cornell and Thurswell's definition of reconciliation as the coincidence of love and freedom. The reference to reconciliation is made within the context of calling for another sexual choreography. With reference to Derrida the call is for a 'relationship to the other where the code of sexual marks would no longer be discriminating. The relationship would not be asexual, far from it, but would be sexual otherwise: beyond the binary difference that governs the decorum of all codes, beyond the opposition masculine/feminine, beyond bisexuality as well, beyond homosexuality and heterosexuality which come to the same thing.'<sup>63</sup>

The call for an alternative ethics of love, a different kind of moral sovereignty can become possible only from challenging how we live our everyday lives, the deepest choices we face and make – the archaic structures of desire. Such a challenge/interrogation could disclose a transformation that is not merely structural/institutional but that could entail the transformation of selves, of how we relate to, how we live with each other, of making a nonviolative relation with the other possible.<sup>64</sup> This must be what was meant by the feminist slogan of the personal is the political. This is what Derrida refers to in the passage quoted at the beginning of this piece. To truly change deeply embedded patterns and structures of discrimination (systemic discrimination), mere thinking, writing and talking will not help – actual living, doing and loving differently might.

I have attempted to trace in the judgments of Albie Sachs hints of a jurisprudence informed, consciously and unconsciously, by a concern with lives and living relations beyond law. By interrogating the roots, tops and centres of issues often left un-interrogated and accepted as normal/natural and neutral, a jurisprudence that is otherwise is opened, maybe even an alchemy of life, love and law.

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<sup>61</sup>Du Toit *A philosophical investigation of rape: The making and unmaking of the feminine self* (2009).

<sup>62</sup>Du Toit (n 60) 15-21; Derrida *On cosmopolitanism and forgiveness* (2001).

<sup>63</sup>The quote continues as follows: 'As I dream of saving the chance that this question offers I would like to believe in the multiplicity of sexually marked voices. I would like to believe in the masses, this indeterminable number of blended voices, this mobile of nonsexual marks whose choreography can carry, divide, multiply the body of each "individual", whether he be classified as "man" or "woman" according to the criteria of usage.' Derrida and MacDonald 'Choreographies' in *Diacrits* (1982) 76 as quoted by Cornell and Thurswell 'Feminism, negativity, subjectivity' 162.

<sup>64</sup>See Cornell *Transformations* (1993)