

# Freedom, constraint and (the) judging (of) Albie Sachs

Danie Brand\*

## Introduction

The central theme of Albie Sachs's most recent book, *The strange alchemy of law and life*,<sup>1</sup> is that law and life are not separate, but intertwined. In the book he takes readers on an excursus through his colourful life until now and through his body of work as a judge on the Constitutional Court.<sup>2</sup> He shows how, throughout his judicial career, he has been constitutionally unable to do what judges are traditionally required to do – to check life (political convictions, personal hunches of right and wrong, life experiences, passion, likes and dislikes, laughter and intuition) at the courtroom door – and how that incapacity has, to his mind, enriched both his dealings with the law, and his life. Although he does not claim, or set out, to articulate a theory of adjudication, he does come close to expressing one in which judging is presented as a constant interplay between life and law or between passion and reason, one in which, despite most often being in tension, neither of the two diminish or erode each other. His account resonates with another theory of adjudication, developed not by a judge but a legal scholar hailing from far beyond our shores – the account of judging as a constant engagement with the tension between freedom and constraint.<sup>3</sup> In this paper I ask to what extent this interplay between freedom and constraint has operated in Justice Sachs' body of work at the Constitutional Court, and whether it can perhaps be used as a lens through which to make sense of that body of work.

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\*BLC, LLB (UP) LLM (Emory) LLD (Stellenbosch). Senior Lecturer, Department of Public Law, University of Pretoria. The background research for this paper was done while working on my doctoral thesis under the supervision of André van der Walt at his South African Research Chair in Property Law, funded by the National Research Foundation and hosted by Stellenbosch University. My thanks to Prof van der Walt for providing the space and support he did. My thanks also to Karin van Marle for reading through various drafts of this paper and sharing her insights, and to Amanda Pieterse-Spies and Wessel le Roux for organising the *Albie Sachs Retrospective* and so prompting me to write this paper. My thanks finally to Justice Albie Sachs, for steadfastly living the often much-maligned idea that life and law are not separate.

<sup>1</sup>Sachs *The strange alchemy of law and life* (2009).

<sup>2</sup>The book consists of excerpts from some of Justice Sachs' judgments, accompanied by stories from his life as a political activist, freedom fighter and judge that have a bearing on the judgments.

<sup>3</sup>Kennedy *A critique of adjudication: {fin de siècle}* (1997).

## Freedom and constraint

In his inaugural lecture presented a few years ago at the University of South Africa, Henk Botha described three different accounts of adjudication – a description that will be familiar to most readers.<sup>4</sup> Following Duncan Kennedy,<sup>5</sup> as presented to a South African readership by Karl Klare,<sup>6</sup> he pointed to three different ways in which to metaphorically depict the operation of legal rules within the process of adjudication that lead to three different understandings of how judges judge.

The first, traditional depiction presents legal rules as straight lines or clear borders. Constraints imposed by legal rules on judging are seen in this view as ‘physical objects, as innate properties of legal materials’.<sup>7</sup> Freedom in judging – the opportunity for a judge to reach outside the legal materials to reach solutions to legal problems – is seen as the exception and occurs only where there are gaps or ‘clearings in the forest’ of constraint. The role of a judge is seen, in the main, as simply subjecting herself to constraint, mechanically applying legal rules as these are presented in the common law or legislation.<sup>8</sup> Law is presented as wholly non-instrumental, an autonomous body of rules uninfluenced in its application by the motivations, aims, failings and predilections of the judge.

The second depiction presents legal rules as argument sound bites, assertions coupled with counter-assertions. Law and judging inheres in this depiction in the ritualistic exchange of such sound bites, stock arguments and stock counter-arguments. Legal argument in this rendition amounts to no more than empty ritual and judging is seen as wholly instrumental, subject to the will of each individual judge. This account in other words focuses on the indeterminate and contradictory nature of legal rules and emphasises the exercise of judicial choice in adjudication.<sup>9</sup>

Botha then turns to a third metaphor in terms of which to present the process of adjudication – one in which judging is said to occur on a ‘field of action’. In this view, law is neither wholly constraining nor wholly open or empty. Judges do experience constraint in legal interpretation. However, constraint is not seen as an innate property of the legal materials that is either there and absolute or not there at all. Rather, constraint here is seen as culturally constructed, an experience judges have of the nature of the materials.<sup>10</sup> This means that they can, through interpretation, work through constraint and find solutions in the materials that did not at first glance present themselves. Judicial work is therefore presented as a ‘field of action’ upon which interplay between freedom and constraint takes place. The virtue of this view is that it recognises the political nature of the search for legal meaning (judges construct rather than find in the

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<sup>4</sup>Published as Botha ‘Freedom and constraint in constitutional adjudication’ (2004) 20 *SAJHR* 249.

<sup>5</sup>Kennedy (n 3); Kennedy ‘Freedom and constraint in adjudication: A critical phenomenology’ (1986) 36 *Journal of Legal Education* 518.

<sup>6</sup>Klare ‘Legal culture and transformative constitutionalism’ (1998) 14 *SAJHR* 146.

<sup>7</sup>Botha (n 4) 260.

<sup>8</sup>*Ibid.*

<sup>9</sup>*Ibid.*

<sup>10</sup>*Id* 261.

legal materials the outcomes of their work, so that they become responsible for those outcomes) without depicting law as wholly political so that normative dialogue becomes impossible (judges remain constrained by the materials, their professional habits of mind and sensibilities and their need to have their outcomes accepted by the professional culture of which they are a part).<sup>11</sup>

Up to this point Botha draws directly on Kennedy and Klare to provide simply a description of different accounts of adjudication. His innovation occurs from here on. He continues to ask a normative question: Which of the three accounts of legal rules and judging related above is best suited to give effect to the transformative ethos of our Constitution?

Seeing legal rules as straight lines or boundaries, with freedom and constraint innate properties of the materials, and seeing judging as a result of the mechanical application of self-evident rules, he argues, does not show a transformative fit. Such a view in the first place leads to complacency with respect to the *status quo* – if the law is self-evident in meaning and absolutely constraining, then whatever outcome the legal rules as perceived at first glance present to a social problem is inevitable and must be accepted. This means that possibilities for transformation cannot easily be imagined.<sup>12</sup> Such a view also leads to an understanding of law that is wholly devoid of politics and that denies the influence that individual judges exert on the outcomes of cases. In this way the responsibility of judges for their work product is denied and judicial work is insulated from public scrutiny and democratic evaluation.<sup>13</sup>

Seeing legal rules as sets of argument sound bites and judging as instrumental decision-making masked by the ritualistic exchange of these sound bites is, for Botha, equally unsuited to the interpretation of a transformative constitution. This account leaves legal meaning entirely to the preference of the individual judge and therefore divests law of any meaningful content and makes it a matter of politics alone. At the same time, the highly structured and constructed nature of argument that such a view of legal work implies, means that substantive ethical argument as a way in which to seek solutions becomes impossible. In short, to see the law in this way is problematic because it 'ultimately results in an instrumental and cynical view of adjudication, in which constraints are seen as illusory and the possibility of a sincere normative dialogue is ruled out'.<sup>14</sup>

By contrast, Botha concludes, the notion of legal rules as operating on a field of action and of judging as work or action, opens possibilities for transformative adjudication. This view of judging introduces the idea that constraint, although real, is culturally constructed, so that what seems an inevitable outcome or self-evident interpretation at first glance can be made to yield through judicial effort. This account therefore 'may form the basis of a more self-conscious style of adjudication, which is characterised by a greater willingness on the part of judges to subject deeply held assumptions to critical scrutiny and to articulate the moral and political reasons for

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<sup>11</sup>*Ibid* 262.

<sup>12</sup>*Ibid* 260. See also Klare (n 6) 162-163.

<sup>13</sup>*Ibid*. See also Klare (n 6) 162-163.

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

their decisions'.<sup>15</sup> In short, such an understanding of their role might alert judges to the possibilities for transformation in their work, and would highlight the responsibility of judges for their decisions, enhancing in the process their accountability. At the same time, because of the recognition of the reality of constraint, this depiction avoids the unbound instrumentalism of the depiction of judging as an exchange of ritualistic sound bites and so requires the kind of normative dialogue that the latter depiction makes impossible.

One way in which this more flexible yet not completely unbounded view of the nature of legal rules can be given effect to, or operationalised, is through the use in constitutional adjudication of broad, flexible, multi-part standards.<sup>16</sup> Because such standards, for their proper application, invite a judicial method aware of the plasticity of legal material they potentially also share the fit with the constitution's transformative ethos that such a method engenders. Importantly, however, this remains subject to a proviso: broad standards can only operate in the transformative politics-friendly manner described above if they are applied in a flexible and open manner, *without completely abandoning certainty and finality*. Complete flexibility and openness would instrumentalise adjudication and so again denude it of transformative politics.

## Freedom, constraint and Albie Sachs

To turn then to the judicial work of Albie Sachs: To what extent has he, in line with his description of his understanding of adjudication in his book, operated according to the notion of judging as a continual engagement with the tension between freedom and constraint?

### *Albie Sachs in action*

At first glance, the answer seems obvious. Of all the justices of the Constitutional Court Justice Sachs is the one who has most explicitly and in the widest variety of ways embraced the notion of adjudication as an engagement with the tension between freedom and constraint, or, as he describes it, between life and law, or passion and reason.<sup>17</sup> He has often explicitly stated this.<sup>18</sup>

But, more importantly, if one works from the critical assumption that it is more important what judges actually do than what they say they do, he has operationalised this notion, and built it into the fabric of his approach to deciding cases.

An obvious example to start with is his really wonderful judgment in *Port Elizabeth Municipality v Various Occupiers*.<sup>19</sup> Readers will recall that this case dealt with an application for an order for the eviction of a group of impoverished

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<sup>15</sup>*Id* 262.

<sup>16</sup>*Id* 275.

<sup>17</sup>Sachs (n 1).

<sup>18</sup>*Id*, in general. See also, eg, *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC) para 640.

<sup>19</sup>*Port Elizabeth Municipality v Various Occupiers* 2000 1 SA 217 (CC).

squatters from privately owned land, brought by the Port Elizabeth Municipality on behalf of the landowners. Justice Sachs starts his judgment with a description of the 'simple and drastic' manner in which the pre-democratic law – the Prevention of Illegal Squatting Act (PISA)<sup>20</sup> – would have dealt with the predicament of the occupiers and the property owners in the case. The law then, he points out, would have reduced the complex, multi-layered, multi-interest problem facing the court to a simple, one-dimensional legal question: is the occupation of the land, judged in terms of a closed and clearly enumerated list of possible rights to occupy, lawful or not? If the occupiers fell on the side of lawfulness, they could remain. If they fell on the side of unlawfulness, they would be summarily ejected and criminally prosecuted to boot.<sup>21</sup> One can hardly ask for a better example of the account of legal rules as straight lines in operation. There is the reduction of a complex and multi-faceted real life problem to a single and simple legal question; there is the either-or, the almost geographical logic of one side or the other at play, all with devastatingly unjust consequences; and there is the possibility for a judge applying the law to deny responsibility for those unjust consequences. To this Justice Sachs contrasts the new legal position in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE).<sup>22</sup> Section 6 of this Act determines that a court may grant an eviction order sought by the state only if it is just and equitable, which question a court must determine taking account of all relevant circumstances, including 'the manner in which occupation was effected, its duration and the availability of suitable alternative accommodation or land'.<sup>23</sup> Obviously, Justice Sachs is here presented with a legal instrument that, without any work on his side, already allows far more flexibility for its interpretation and application than did the PISA. However, working from this basis he takes great care to emphasise that the list of circumstances explicitly enumerated in sec 6 is not closed – that in each case courts have to take into account whatever circumstances are relevant to the particular, individualised dispute. In his own words:<sup>24</sup>

The combination of circumstances may be extremely intricate, requiring a nuanced appreciation of the specific situation in each case. Thus, though there might be a sad uniformity in the conditions of homelessness and desperation which lead to unlawful occupations, on the one hand, and the frustration of landowners at being blocked by intruders from enjoyment of their property, on the other, the actual details of the relationships involved are capable of infinite variation.

and

The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed

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<sup>20</sup>Act 52 of 1951.

<sup>21</sup>*PE Municipality* (n 19) para 8.

<sup>22</sup>Act 19 of 1998.

<sup>23</sup>*PE Municipality* (n 19) para 25.

<sup>24</sup>*Ibid.*

claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case.<sup>25</sup>

In this way he makes sure that the openness of the standard in the PIE Act and the flexibility it allows is stretched to its limits. But the openness of this standard is not absolute. Earlier in the judgment, Justice Sachs takes equal care to emphasise that the section 6 consideration of circumstances and determination of justice and equitability must occur within a certain normative framework, within a 'defined and carefully calibrated constitutional matrix'.<sup>26</sup> This framework includes a thorough consideration of the history of the Act and its reason and purpose for enactment – that it 'was adopted with the manifest objective of overcoming the ... abuses [occasioned by the PISA] and ensuring that evictions in future took place in a manner consistent with the values of the new constitutional dispensation. Its provisions have to be interpreted against this background.'<sup>27</sup> It also includes the structure and values of the Constitution, and consideration for a range of constitutional rights not directly pertinent to an eviction dispute, such as human dignity.<sup>28</sup> One can hardly ask for a better practical description of the kind of flexible standard that gives expression to the conception of adjudication as the continual negotiation of the tension between freedom and constraint described above – one that takes adequate account of the specificities of each individual case without losing sight of the constraints of the broader historical and other contexts and the textually expressed normative framework.

Justice Sachs's understanding and embrace of this conception of judging also finds expression elsewhere in *Port Elizabeth Municipality*. Having decided that he would deny the application for an eviction order, mainly because the Municipality had failed to offer adequate alternative land and accommodation to the occupiers were they to be evicted,<sup>29</sup> he considers whether it would be appropriate for him to have granted the eviction order, subject to a proviso that the parties enter into mediation with the aim of reaching a mutually acceptable agreement about the alternative accommodation to be provided to the occupiers, the schedule and manner of the removal, etc.<sup>30</sup> He elects not to do so, but his remarks raise the possibility of the idea of legal rules as flexible standards rather than fixed, straight-line rules being extended to the remedial stage of adjudication. In short, Justice Sachs raises the possibility that he could have fashioned an order that is a flexible standard – a normative framework (the occupiers have to be provided with suitable alternative accommodation, the basic standards of which are set out by the court; the basic standards with which the manner and schedule of their removal has to comply could be set out by the court), the precise content of which will be determined by the parties, with the ultimate approval of the court pending.

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<sup>25</sup> *Ibid.*

<sup>26</sup> *Id* para 14.

<sup>27</sup> *Id* para 11.

<sup>28</sup> *Id* para 15.

<sup>29</sup> *Id* paras 59-10.

<sup>30</sup> *Id* paras 39-47.

A second example of a judgment of Justice Sachs's that exhibits the understanding of his role as operating within the tension between freedom and constraint may be found in *S v M*.<sup>31</sup> This case dealt with the question of whether, in sentencing the primary caregiver of young children to a term of imprisonment, the lower courts had sufficiently regarded the section 28(2) constitutional requirement that in all matters concerning children, their own best interests should be paramount. Responding to charges that the paramountcy requirement of section 28(2) is too flexible and indeterminate to be useful as a legal standard, Justice Sachs has the following to say:<sup>32</sup>

... [I]t is precisely the contextual nature and inherent flexibility of section 28 that constitutes the source of its strength. ... [I]ndeterminacy of outcome is not a weakness. A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned.

Again, however, he takes care not to deny the existence of, and indeed the need for, constraint. He refers to the problem that, stated in 'emphatic'<sup>33</sup> terms as it is ('a child's best interest is of *paramount* importance in *every matter concerning the child*') the requirement can be interpreted to apply to literally every matter that has an impact on a child, however indirect that impact might be, and that the interest of the child must then be paramount, no matter what other interests are also involved in whatever manner. Were the paramountcy requirement to be interpreted in this literal manner, he points out, it would indeed run the risk of losing all 'normative efficacy':<sup>34</sup>

If the paramountcy principle is spread too thin it risks being transformed from an effective instrument of child protection into an empty rhetorical phrase of weak application, thereby defeating rather than promoting the objective of section 28(2).

To avoid this possibility he proposes an interpretation of the requirement that would indeed impose limits on its scope of application and effect, where it applies. He points to previous judgments of the Court where it was held both that section 28(2) is a right, so that its limitation to advance other interests is possible through the mechanism of section 36 of the Constitution;<sup>35</sup> and that section 28(2) enjoys no automatic dominance over other constitutional rights, so that where the application of section 28(2) would limit other constitutional rights, the apparent conflict between them must be resolved, again, through the application of section 36, without one trumping the other.<sup>36</sup>

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<sup>31</sup>*S v M* 2008 3 SA 232 (CC).

<sup>32</sup>*Id* para 24.

<sup>33</sup>*Id* para 25.

<sup>34</sup>*Id* para 13.

<sup>35</sup>*Id* para 26, referring to *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) and *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 1 SA 406 (CC).

<sup>36</sup>*Ibid*.

In this way he eschews the literal, straight-line interpretation of section 28(2) that would see it simply trumping all other rights and interests in all contexts where a matter affects a child; and the possible characterisation of section 28(2) as an argument sound bite on steroids, the mere assertion of which trumps any other sound bite – both of which are interpretations that render the rule an either/or proposition that must be applied by judges in a mechanical fashion, without reasoned argument. Instead he depicts section 28(2) as requiring judges to reach a conclusion specific to each case, through the application of real judgment – normative reasoning – within a carefully constructed framework of constraint; and imposing as a result judicial responsibility for whatever outcome is generated.

In summary: a leitmotif of Justice Sachs's body of judgments has been his apparent understanding that legal rules are neither straight lines with self-evident meaning capable of mechanical application, nor simply rhetorical argument sound bites without any normative content, but that judging occurs on a field of action, with meaning determined anew in each case within, of course, a guiding normative framework.

But that is not the end of the story. If we can return for a moment to Botha's description of three different accounts of adjudication, with, at the one end of the spectrum an understanding of legal rules as absolute constraint and judging as a mechanical finding and application of predetermined meaning; at the other end an understanding of judging as a wholly instrumentalised argumentative free-for-all; and in the middle an account of judging as occurring on a field of action, within the tension between freedom and constraint: we find in Justice Sachs's body of judgments not only the stellar examples of the latter conception of judging, but also clear examples of the conceptions of judging at the two outer limits of the spectrum.

### *Straight lines*

First, the understanding of judging as an almost mechanical application of straight-line rules with self-evident meaning: two examples. In *Soobramoney*<sup>37</sup> – a case that dealt with an impoverished terminally ill man's claim for the provision of life-prolonging medical treatment at state expense – Justice Sachs' concurring judgment turns on one proposition. He makes the point that in a context of scarce resources rationing of health care is an inescapable fact and then proceeds to hold that there is no reason to question the manner in which resources had been rationed in the case before the Court – indeed that it is not quite the place of the Court to question the rationing choices made by the other branches of government.<sup>38</sup>

One can speculate about the reasons for this decision. Obvious suspects are concerns about separation of powers – concerns about the institutional capacity of the court to second-guess the rationing choices made by others and about the constitutional comity of doing so. If that is the case, then we are in straight-line territory – a legal concept (separation of powers/ judicial deference) is presented as

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<sup>37</sup> *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC).

<sup>38</sup> *Id* paras 53-54.

clear and self-evident (the extent of the Court's capacity and the bounds of its powers are not interrogated, but simply stated as a self-evident fact) and is used to simplify a highly complex matter involving not only information that can be interpreted in many different ways but also myriad sets of conflicting interests into a direct 'either/or' legal question: is it our business, or is it not?<sup>39</sup> The anti-transformative result of this aspect of the judgment is twofold. Firstly, normative engagement with the problem before the court (how limited resources should be rationed) and a search for solutions to that problem is not only avoided, but completely precluded – the *status quo* and the absence of transformative possibilities is accepted as inevitable in a particularly graphic manner. Secondly, despite stating that he is not merely 'toll[ing] the bell of lack of resources',<sup>40</sup> Justice Sachs succeeds in divesting himself of responsibility for the outcome of the case by presenting it as simply dictated by the law and not caused by his choice.

The second example is perhaps unfair, because it is found not in a judgment penned by Justice Sachs but in his signing onto the majority judgment of Justice Skweyiya in the case of *Chirwa*.<sup>41</sup> However, it is so on point, that I could not resist including it. This case dealt with the vexed question of whether a public sector employer's decision to dismiss an employee can be challenged in the High Court on the basis of the administrative law codified in the Promotion of Administrative Justice Act (the PAJA),<sup>42</sup> or whether such a decision must be decided exclusively on the basis of the labour law and by the Labour Court. Both the majority judgment of Justice Skweyiya and the dissent of Chief Justice Langa concluded that the dismissal in question fell to be decided by the Labour Court in terms of the Labour Relations Act (LRA),<sup>43</sup> but they reached this shared conclusion in very different ways.

Justice Langa presented the question as a substantive one – whether or not the dismissal in question constituted administrative action.<sup>44</sup> This question hinged on a wide variety of factors, each of which might be different in different specific cases, for example, the source of the power in question, or whether the dismissal touched upon the public interest, etc.<sup>45</sup> The High Court, for him, has jurisdiction to determine this question, and if the dismissal is found to be administrative action, the High Court has jurisdiction to decide a challenge made to it on review.<sup>46</sup> Justice Langa therefore avoids making it a simple question of jurisdiction. He requires a decision to be made in each case as to whether or not the conduct in question is administrative action in terms of the PAJA, and this decision must be taken according to the consideration of a wide variety of context specific factors, within a broad normative framework prescribed by the definition of 'administrative action' in section 1 of the PAJA.

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<sup>39</sup>*Id* para 58.

<sup>40</sup>*Id* para 52.

<sup>41</sup>*Chirwa v Transnet Limited* 2008 4 SA 367 (CC).

<sup>42</sup>Act 3 of 2000.

<sup>43</sup>Act 66 of 1995.

<sup>44</sup>*Chirwa* (n 41) para 154.

<sup>45</sup>*Id* para 181.

<sup>46</sup>*Id* para 154.

Justice Skweyiya chose to present the question as a simple either-or matter of procedure: does the High Court or the Labour Court have jurisdiction over challenges to public sector dismissal?<sup>47</sup> On the basis of an interpretation of the LRA he comes to the conclusion that jurisdiction in such matters lies with the Labour Court alone.<sup>48</sup> That is, he chooses to avoid the complex substantive questions of interest balancing that were central to Justice Langa's conclusion by employing the legal figure of jurisdiction, with its almost geographical, straight-line, either-or metaphorical implications.<sup>49</sup>

Given Justice Sachs's record in cases such as *PE* and *S v M* described above, one would have expected Justice Sachs to sign onto Justice Langa's dissent, with its embrace of a flexible, substantive standard operating within a normative framework as solution to a complex problem. Instead, he opts for Justice Skweyiya's simplistic either/or, straight-line reasoning.

So, we have at least these two clear examples of Justice Sachs presenting legal rules as more or less absolutely constraining, straight lines determining complex questions in a simple either/or fashion. For examples of the conception of judging at the other end of the spectrum, as complete freedom and therefore potentially as wholly instrumentalised, we can turn to Justice Sachs's record in administrative law cases.

### *Complete freedom*

Justice Sachs's approach to the difficult question of the classification of conduct in, and the scope of application of, administrative law is to my mind epitomised in his opinion in *New Clicks*<sup>50</sup> about whether or not the making of ministerial regulations is subject to the guarantees of procedural fairness. He holds, as does Justice Chaskalson, that they are, but not so much in terms of the administrative law as by virtue of an 'expanded notion of legality'.<sup>51</sup> In doing so he brushes aside what has always been the most important practical or consequential reason why a distinction is made between administrative action and public conduct that is not administrative action: the former bears the burden of procedural fairness requirements and the latter does not.

Much of his judgment turns out to be a problematisation of the need in law for neat categorisation – he speaks of flexibility and the need to break down the artificial borders between potentially overlapping systems of public law control.<sup>52</sup> He veers, therefore, toward more freedom in contrast to the constraint of clear and rigid

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<sup>47</sup>*Id* para 20.

<sup>48</sup>*Id* para 64.

<sup>49</sup>I might mention that the Constitutional Court has had to consider this same question again, after a great deal of dissent in the lower courts following *Chirwa*, which tells one something about which of the two judgments was the more realistic. See *Gcaba v Minister of Safety and Security* CCT 64/08 [2009] ZACC 26 (7 October 2009).

<sup>50</sup>(N 18).

<sup>51</sup>*Id* para 583.

<sup>52</sup>*Id* para 640.

categories. This is in itself not problematic and indeed it is to be welcomed, particularly in the administrative law, where of late so much has come to depend upon which category the conduct in question falls into and on a rigid conceptualism. What is problematic, at least in my reading, is that Justice Sachs, having done away with the existing, admittedly rigid and inadequate categorisation, offers little in the way of a normative framework on the basis of which to decide whether conduct is subject to procedural fairness or not. In this way he comes close to presenting the applicable law as absolutely free, or absolutely indeterminate, without any categorisation and the judge's role to apply it is seen as absolutely instrumental, normatively unbound. Here, Justice Sachs reaches the other end of the spectrum.

We find much the same approach, with the same problems, in Justice Sachs's separate judgment in *Sidumo*.<sup>53</sup> In this case the central question was whether an arbitral decision of a Commissioner of the Commission for Conciliation, Mediation and Arbitration is administrative action and is subject to administrative law review, or whether it is judicial action and so only subject to review in terms of section 145 of the LRA. Acting Justice Navsa, in his opinion for the majority of the Court, held that the decision was administrative action, but that nevertheless it fell to be reviewed only in terms of section 145 of the LRA, albeit this section interpreted in such a fashion as to give effect to the section 33 constitutional right to administrative justice.<sup>54</sup> The core of his decision in this respect, particularly if one reads it with Justice O'Regan's concurring judgment, is that judicial action not subject to administrative law is conduct of a judicial nature *of a court*. To determine whether conduct of a judicial nature constitutes administrative action or not, the enquiry will turn on whether the body performing the conduct is a court. This question is to be answered through the application of a flexible, multi-part, context sensitive standard, taking account, amongst other things, of the status of the body in question, the nature and extent of its powers, the question whether or not it falls within the hierarchy of courts, the nature and status of those presiding over it, the effect of its decisions and the nature of its processes.<sup>55</sup>

Justice Ncgobo, in his dissent, takes the diametrically opposite view, not only in result, but also in reasoning. For him the point of departure is the basic approach to determining whether conduct is administrative action as articulated by the Constitutional Court in previous cases such as *SARFU*<sup>56</sup> and *Fedsure*,<sup>57</sup> where it was decided that the determining factor is not the identity of the decision-maker but the nature of the conduct.<sup>58</sup> On this basis, he holds that it is irrelevant whether or not a body performing judicial conduct is a court – if its conduct is judicial in nature in the sense that it amounts to the resolution of a dispute through

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<sup>53</sup>*Sidumo v Rustenburg Platinum Mines Ltd* 2008 2 SA 24 (CC).

<sup>54</sup>*Id* para 104.

<sup>55</sup>*Id* paras 80-88.

<sup>56</sup>*President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC).

<sup>57</sup>*Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC).

<sup>58</sup>*Sidumo* (n 53) para 203.

the application of law to facts and if it is performed in a judicial manner, using judicial process and powers similar to judicial powers, then it cannot be administrative action and cannot be reviewed in terms of the administrative law.<sup>59</sup>

Justice Sachs's response to the directly conflicting views of his colleagues is to pretend that there is indeed no conflict. He starts his judgment by stating that the case:

illustrates the need for our constitutional jurisprudence to ... move away from unduly rigid compartmentalisation so as to allow judicial reasoning to embrace fluid concepts of hybridity and permeability in those matters.<sup>60</sup>

He then proceeds to argue that it makes no sense to think in terms of different sets of rules for the regulation of different forms of public conduct, as most public conduct – including the decision at issue in the case – are 'hybrid' in nature and therefore invite the application of different rights at the same time.<sup>61</sup> He proposes instead that the exercise of public power should be subjected to what he called in *New Clicks* a 'hybrid regulatory system' that applies to all public conduct, but that fashions the nature and strictness of the requirements it poses in each specific case according to the circumstances.<sup>62</sup> He concludes by holding that he agrees in the resolution of the case arrived at by Acting Justice Navsa for the majority of the Court – that the decision in question was an administrative decision subject to the administrative law, but that it should nevertheless be reviewed in terms of section 145 of the LRA by the Labour Court, although interpreted in light of section 33 of the Constitution. Indeed, he describes this resolution as a perfect example of the kind of 'permeability' and 'seepage' he advocates, where the category within which a decision is classified does not determine the set of rules that applies to it.<sup>63</sup>

Again, Justice Sachs's language of flexibility and his plea for the relaxing of rigid categorisation is very attractive – it indicates a clear intention to break with the view of rules as straight lines with clear, self-evident meaning in favour of a recognition of the plasticity of legal materials. However, again, as in *New Clicks*, Justice Sachs here seems to disregard both the reality of and the need for constraint. First, although stating that the nature of the rules to apply to a particular decision 'will accordingly depend more on the nature of the interests at stake in each particular instance than on the label or labels to be attached'<sup>64</sup> and that judges should 'develop an appropriate analytical methodology that eschews formal pigeonholing and relies more on integrated reasoning',<sup>65</sup> Justice Sachs simply does not provide an 'appropriate analytical methodology' in his judgment. There is no indication of a framework within which the freedom of his proposed

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<sup>59</sup>*Id* para 204.

<sup>60</sup>*Id* para 143.

<sup>61</sup>*Id* para 147.

<sup>62</sup>*Id* para 155.

<sup>63</sup>*Id* para 159.

<sup>64</sup>*Id* para 55.

<sup>65</sup>*Id* para 51.

approach can be managed to ensure that it does not degenerate into an *ad hoc*, instrumentalist free for all – how would one decide, in an equitable manner, what nature of control should be imposed on a particular decision?

Second, Justice Sachs writes as though the practical constraints in the context of the *Sidumo* case on the implementation of a hybrid approach are simply illusory – the fact that there are different regulatory schemes operating, for different sorts of conduct, which have different enforcement and remedial schemes for reasons that cannot simply be disregarded, and the fact that the decision as to which of those different regulatory schemes applies has real consequences for litigants in such cases.

Here, Justice Sachs seems to veer once more toward a normative vacuum and the impossibility of ‘sincere normative dialogue’ which that entails.

## Conclusion

So what are we to make of this seeming inconsistency in judicial method and understanding in Justice Sachs’s over-all record? It is tempting to write it off as an indication of simply an *ad hoc*, normatively unprincipled approach to judging – almost an absence of an approach within which Justice Sachs decides on a whim how to approach each case that comes before him.

However, I think it would be too easy, and wrong, to dismiss his decisions in this way. Can we not instead apply the understanding of adjudication as a continual engagement with the tension between freedom and constraint to Justice Sachs’s body of judgments as a whole, rather than as a tool for analysing only specific judgments? Can we not conceive of his whole record as a legal standard, the content of which is determined anew in each specific case? His flexibility in approach – the fact that he decides some cases in a different way to others – is then its strength rather than its weakness. It would show sensitivity to context, an understanding that legal certainty and clarity of meaning is merely a shield to hide behind and a refreshing willingness to accept responsibility for outcome in each and every case (‘it is I who decided how to approach this case – I did not simply apply a predetermined formula’).

But this can only be the case if Justice Sachs’s flexibility in approach is not absolute. In other words, we would ourselves have to be consistent and ask whether his flexibility is absolute, or whether it occurs within a guiding normative framework of some kind. If such a framework were absent, flexibility would again become inconsistency. This then would be the final question to ask of Justice Sachs – whether there is some method to his madness. I have myself been unable to determine that. Certainly, there are trends: so, for example, all of the instances in which Justice Sachs has tended toward normative anarchy, have been cases in which he wrote separate opinions that had no direct bearing on the outcome in the cases. Perhaps he felt the freedom in such circumstances to be less precise and more exploratory and speculative. Equally, the cases in which he seemed most consciously to engage with the tension between freedom and constraint and to

operate as though working on a field of action, have been cases in which he wrote for the Court, so that he decided the dispute before him with real consequences. Perhaps this simply forced him to be more precise and to provide clearer justification for his holdings. But these are observations or descriptions only – I have no analyses of his body of work that render an overarching normative framework within which to make sense of the diversity of his approaches.

I would suggest that here one should employ the approach of ‘interpretive charity’ recently advocated by Frank Michelman in his paper in the inaugural *Constitutional Court Review*<sup>66</sup> – that is, the idea that, when involved in an interpretive disagreement, one should give to one’s opponent’s view the best possible (the most charitable possible) reading. If I do so, then I can offer the following. The best possible reading to give to Justice Sachs’s judicial record is one that would assume rhyme and reason, that would assume the existence of a normative framework that guided his individual decisions about how to approach specific cases. This approach offers a way out. I am willing to take it.

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<sup>66</sup>Michelman ‘On the uses of interpretive charity: Some notes on application, avoidance, equality and objective unconstitutionality for the 2007 term of the Constitutional Court of South Africa’ (2008) 1 *Constitutional Court Review* 1 at 3-4.