

CHAPTER 2

THE CONSTITUTIONALIST CONCEPT OF JUSTICE L ACKERMANN: EVOLUTION BY REVOLUTION

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Source: <http://www.constitutionalcourt.org.za/site/judges/justicelwhackermann/index1.html>

1 Introduction

Justice LWH Ackermann was arguably one of the most systematic expositors of the South African Constitution. The task of identifying his words and thoughts in order to illuminate the evolution of the South African Constitution is thus greatly assisted by the character of his writings, both in his judgments while serving on the Constitutional Court and by his extra-curial writings before and after his Court service. His judgments most prominently include those delivered from the Constitutional Court though he also served on the High Court both in the Transvaal during *apartheid* and later in the Cape.

In these writings, much of Justice Ackermann's focus has been on dignity and its relationship to equality. Ackermann's writings after leaving the Bench include his monograph, *Human Dignity: Lodestar for Equality in*

South Africa.⁹³ He wryly observed: 'During my forensic life I had written numerous opinions, heads of argument and judgments, but these had not – I found – prepared me properly for writing a book. I am not sure why.'⁹⁴

This monograph gave Ackermann the opportunity to articulate both the Court's and his own views on dignity and equality. As his close colleague Justice O'Regan points out in her foreword to this book: 'From early on, the Constitutional Court asserted that human dignity was key to the interpretation of the equality clause. This approach has been criticised in some quarters, and supported in others. This book is a sustained argument for the proposition that the concept of human dignity is integral to the interpretation of the equality clause, as the Court has asserted.'⁹⁵ Indeed, Ackermann's statement of one of the principal arguments of his book goes further than O'Regan's identification of the Court's assertion of dignity as 'integral to the interpretation' of equality. For Ackermann, 'for legal purposes, the answer to the question "equality of what" ... is/should be human worth (dignity).'⁹⁶

One can see three distinct imagined revolutions in Ackermann's constitutionalist thought: that of human rights; that of the South African Bill of Rights; and that of comparative constitutionalism. Each of these is more a revolution from above than from below. But they are revolutions nonetheless. This chapter's use of the term 'revolution' differs somewhat from that of Roger Berkowitz – who has argued that Ackermann's judgments were 'an example of the double revolutionary activity of founding and creating.'⁹⁷ It is more in line with Ackermann's own understanding of a revolution as a significant change in structure or practice, as explained below. But we should agree wholeheartedly with the identification of the spirit that Berkowitz has found in Ackermann's 'revolutionary' judgments – 'the joy in debating, the love of contest, and the exhilaration of the act of founding that erupts from his prose.'⁹⁸

Each of the three revolutions discussed below points to the distinct features Ackermann brought to the constitutional pathway he co-created with his colleagues: the Constitution's continuity and discontinuity with the legal order that preceded it as well as its equally constitutive relationship with other global legal orders. This chapter will use these three revolutions to trace the Constitution's evolutionary path by exploring a number of Ackermann's court judgements, his out-of-court writings in

93 L Ackermann *Human dignity: Lodestar for equality in South Africa* (2012).

94 As above, vii.

95 As above, x.

96 As above, 17.

97 R Berkowitz 'Revolutionary constitutionalism: Some thoughts on Laurie Ackermann's jurisprudence' in AJ Barnard-Naudé *et al Dignity, freedom and the post-apartheid legal order: The critical jurisprudence of Laurie Ackermann* (2008) 217.

98 As above.

journal articles, book chapters, and books, as well as speeches he made and interviews conducted with him.

2 The human rights rEvolution

The first revolution is the human rights revolution. It is perhaps here where Ackermann's words are the sparsest and his deeds the most fulsome. It is primarily in his action in stepping down from the then-*apartheid* Bench that Ackermann engaged in his most revolutionary action. This action directly contributed to evolutionary change in South African constitutionalism.

Justice Ackermann may easily be identified with the South African constitutionalist culture existing prior to 1994. One might pull out three strands to this culture that Ackermann embodied: its attention to legal expertise; its relative inclusivism; and its values-based character. In many countries, legal expertise is cultivated within universities, such as in many of the civil law jurisdictions of Europe. In addition to having displayed excellence as a student, Ackermann transitioned from the *apartheid* Supreme Court Bench in the Transvaal to the Constitutional Court Bench through the Faculty of Law at Stellenbosch. At the height of South Africa's intellectual human rights revolution, he thus spent some key formative years as a law professor. He was possibly the first of South Africa's top-judges-in-waiting to do so. The more usual judicial career of South Africa's top judges, certainly at the Appellate Division, had been decidedly different throughout *apartheid*.⁹⁹ Ackermann's, by contrast, shows a fusion of the bar, the Bench, and the academy in the Cape. These are all places professing expertise and can be seen in sum as a distinct legal culture with a decided scholarly bent.¹⁰⁰

After his studies at Stellenbosch and as a Cape Rhodes Scholar at Oxford, Ackermann worked as an advocate at the Pretoria Bar. He took acting appointments to the Bench from as early as 1976 and was permanently appointed to the Transvaal Provincial Division of the Supreme Court in 1980, serving until 1987. His appointment occurred immediately after then-Chief Justice Michael Corbett's celebrated speech supporting human rights in 1979, although it is unclear to what extent, if any, that speech was a factor in Ackermann's acceptance of this appointment. Nevertheless, in September 1987 Ackermann resigned to inaugurate the newly established Harry Oppenheimer Chair in Human Rights Law at the University of Stellenbosch, holding that position until the end of 1992. During his academic appointment, he served on the highest courts of two of South Africa's neighbouring states: on the Lesotho

99 H Corder *Judges at work: The role and attitudes of the South African appellate judiciary, 1910-1950* (1984).

100 H Corder *A charter for social justice: A contribution to the South African Bill of Rights debate* (1992); DV Cowen & S Cowen *Cowen on law: Selected essays* (2008).

Court of Appeal from 1988 to 1992; and on the Namibian Supreme Court as an acting judge of appeal from 1991 to 1992. He was briefly reappointed to the High Court in the Cape in 1993 and from there was appointed to the Constitutional Court.

Pre-1994 constitutionalist culture might also be identified as relatively inclusive: racially segregationist (undoubtedly) yet distinctly neither English nor Afrikaans, but South African. This relatively inclusive elite culture mirrored, and derived to some extent from, the development of a South African identity built initially through a defective and incomplete notion of equality between English-speaking South Africans and Afrikaners, an equality of course encompassing only whites.¹⁰¹ This culture of cautious openness comes through in Ackermann's own life narrative: 'Both my parents were Afrikaners but they believed in being South Africans first, and Afrikaners second. And from the cradle I was brought up bilingually and bi-culturally in the sense that I spoke both the European languages, English and Afrikaans, and imbibed a dual culture from childhood.'¹⁰² As this quotation demonstrates, Ackermann appears comfortable in recognizing his cultural identity as an Afrikaner. He thus occupied a space within a legal polity which has been influenced primarily by British legal cultural scripts more than any others, as aptly described by Martin Chanock.¹⁰³ One may trace some of Ackermann's facility with the interplay of revolution and evolution to this distinctive Cape fusion of English and Afrikaans legal traditions, betokening as they do the civil law and common law long beloved as topics of discussion by pre-Constitutionalist legal historians.¹⁰⁴ Married to Denise Ackermann, the prominent feminist theologian based at the University of the Western Cape (a university often identified with the coloured community in the Cape),¹⁰⁵ Ackermann was at home in a supportive and rich environment that was decidedly not narrow.

Finally, its values-based character was also a significant part of the pre-1994 South African constitutionalist culture which Ackermann epitomised. While for many whites protestant Christianity bolstered the defence of *apartheid*, in the practice of some (such as the Ackermanns) it manifested itself as an attachment to human rights.¹⁰⁶ Writing of Denise Ackermann's set of autobiographical essays, Desmond Tutu observed: 'it

101 J Lambert 'An identity threatened: White English-speaking South Africans, Britishness and dominion South Africanism, 1934-1939' (2005) 37(1) *Kleio* 50.

102 University of the Witwatersrand 'Constitutional Court Oral History Project: Interview with Lourens Ackermann' (6 December 2011) http://www.historicalpapers.wits.ac.za/index.php?inventory_enhanced/U/Collections&c=213564/R/AG3368-A1 (accessed 23 May 2017).

103 M Chanock 'Writing South African legal history: A prospectus' (1989) 30(2) *The Journal of African History* 265.

104 R Zimmermann & D Visser *Southern cross: Civil law and common law in South Africa* (1996); HR Hahlo & E Kahn *The South African legal system and its background* (1968).

105 D Ackermann *After the locusts: Letters from a landscape of faith* (2003).

106 S Dubow *South Africa's struggle for human rights* (2012).

is a deeply moving account of a very special person, remarkably courageous: she and her lawyer husband, now a Judge in our Constitutional Court, have paid heavily for holding to their beliefs and principles which put them at odds with the majority of their community.¹⁰⁷ As we shall see, this values-based character had a Christian manifestation in Ackermann's own thought.

The values-based strand to this culture is evident in Ackermann's writings on dignity. One of Justice Ackermann's most quoted passages about the meaning of dignity in the South African Constitution is in *Ferreira v Levin*:

Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their 'humanness' to the full extent of its potential. Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally.¹⁰⁸

Dignity was one of the rights at issue when Ackermann, together with Goldstone J, identified 'the objective value system embodied in the Constitution'.¹⁰⁹ On behalf of the Court, they held that, in addressing the positive obligations on members of the police force found in the Constitution and the relevant legislation 'in relation to dignity and the freedom and security of the person, few things can be more important to women than freedom from the threat of sexual violence'.¹¹⁰

In one of his sole-authored judgments, Ackermann even approached the value of dignity from a critical perspective. The case concerned the sentence of life imprisonment. For Ackermann, 'to attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end'.¹¹¹

107 Ackermann (n 105 above).

108 *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC).

109 *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC).

110 As above, para 62.

111 *S v Dodo* 2001 (3) SA 382 (CC).

Drucilla Cornell has drawn precisely from this passage in developing from Ackermann's jurisprudence what she terms 'the critical edge of dignity as moral ideal'.¹¹² In Cornell's analysis, the Constitution is both law (what is) and an ethical aspiration (what we want to become); it is both journey and destination; it is a magnificent bridge over a yawning chasm between where we come from and where we want to be. Cornell quotes Ackermann as describing the ultimate fate of our 'transforming' Constitution – 'a bridge with a very long span' – as reliant not only on the jurisprudence of its courts, but also on 'everyone, in government as well as in civil society at all levels,' embracing and living out 'its values and its demands.'

However, it is in Ackermann's extra-curial writings that he delves most deeply into the sources of his personal beliefs regarding the value of dignity. Ackermann supported the 1994 Constitution's move to articulate the basis of the South African order as a secular state rather than one based on Christian nationalism.¹¹³ But his support for a secular state and for the dominant global norm of judges not justifying their decisions through reference to their religious beliefs does not mean that Ackermann did not firmly hold and defend those religious beliefs and depend on them in his choices.

Indeed, for Ackermann, it seems clear: Christianity supports Kant. In 2004, Ackermann wrote: 'As essentially a court lawyer, with no formal training in philosophy, I dare to take my stand on Kant because his imperatives encapsulate for me, by way of contrast and in the most rationally compelling manner that I have been able to discover, what was so obscene about *apartheid*. It serves as a constant reminder of our very ugly recent past. As a reforming Constitution, it is right that human dignity should be so highly valued.'¹¹⁴ Ackermann in this passage seems to imply that his use of Kant is instrumental and discretionary, impelled by twin senses of the wrongness of *apartheid* – its obscenity (a clearly value-laden term) as well as the attractiveness of a rational conception of order.

Indeed, Ackermann has explicitly stated his hermeneutical method: '[i]t is permissible and indeed necessary to look at the ills of the past which [the Constitution] seeks to rectify and in this way try to establish what equality and dignity mean.'¹¹⁵ Elsewhere, he also writes that 'Kant, to my mind, musters the most powerful and convincing *secular* arguments in support of human dignity being a worth beyond price, and hence equal in

112 D Cornell 'Bridging the span toward justice: Laurie Ackermann and the ongoing architectonic of dignity jurisprudence' in AJ Barnard-Naude *et al* *Dignity, freedom and the post-apartheid legal order: The critical jurisprudence of Laurie Ackermann* (2008) 30-34.

113 A Leatt 'Faithfully secular: Secularism and South African political life' (2007) 20(2) *Journal for the Study of Religion* 29-44.

114 LWH Ackermann 'The legal nature of the South African constitutional revolution' (2004) 2004 *New Zealand Law Review* 633.

115 As above.

and for all persons' (emphasis added).¹¹⁶ For Ackermann, Kant gives the best secular justification and explanation of what the values of dignity and equality should mean.

The text quoted directly above is part of a constitutional conversation between Ackermann and Prof Stu Woolman. Here, Ackermann brings to the table extensive quotations and material from Christianity. He quotes from the first chapter of the first book of the Bible, Genesis 1:27: 'So God created humankind in his image, in the image of God he created them; male and female he created them.'¹¹⁷ Ackermann carefully points to the Christian belief system of other expositors (and indeed sources) of the South African legal order, in particular Grotius, the Dutch jurist whom Ackermann notes was additionally a theologian and a Christian believer.¹¹⁸ Ackermann also embraces the expanding contemporary literature on Christianity and human rights, while simultaneously citing the Muslim writer Abdulahi An-Na'im. In his forthright acknowledgement of these beliefs, Ackermann is ever the careful lawyer, indeed as careful to be inclusive with his religion as he is with his law. He does not ground himself in Christianity only but instead, as the use of An-Na'im manifests, in the Abrahamic religions more broadly and further disavows any attempt to subvert a secular Constitution.¹¹⁹

The fine balance between his approach to his faith and his judicial responsibilities emerges in Ackermann's defining moment in respect of the pre-1994 South African constitutional culture: his resignation from the then-Supreme Court Bench. For Ackermann, his resignation as a judge was consistent with his judicial philosophy:

I don't like the word judicial activism, because in certain connotations it means acting outside the Law. I resigned from the Bench because I regarded [that] my Oath of Office [w]as not something that could be fiddled with. I took an oath to uphold the Law, it's the Law *inter alia* passed by the government. I couldn't pretend that my Oath of Office was to uphold some supernatural law. I might have been wrong, but that's my approach and I resigned because I didn't feel that one could do any more in terms of the Oath of Office ... [that one took]. Now, I don't regard my action as activist, and I don't like the word activist.¹²⁰

Of course his action emphasised some aspects of constitutionalism more than others.

116 LWH Ackermann 'The soul of dignity: A reply to Stu Woolman' in S Woolman & M Bishop (eds) *Constitutional conversations* (2008) 218.

117 As above, 219.

118 As above, 219–20.

119 As above, 220.

120 N Bohler-Muller & G Pienaar 'HSRC Constitutional Justice Project: Interview with Justice LWH Ackermann' (2014).

In this refashioning of a Christian perspective on the values-laden character of South African constitutionalist culture, Ackermann is on unassailable legal academic ground. He quotes one of the most respected current legal scholars, Jeremy Waldron, to the effect that: '[w]e might reasonably expect to find further clues to a rich and adequate conception of persons, equality, justice, and rights in what is currently made of the Christian-centered tradition by those who remain centred in Christ.'¹²¹ Ackermann's theoretical chapter in *Human Dignity: Lodestar for Equality in South Africa* similarly rounds off with an exploration of 'crucial aspects of the theological and secular philosophic background, and indeed grounding, of the legal concepts of human worth and equality.' Ackermann 'seeks to justify this theological and philosophical use in the process of giving meaning to these concepts in constitutional law.'¹²² There is an interesting parallel here to the purpose of this volume. While the present volume links the curial with the extra-curial through the words of the Justices, this inner focus of Ackermann's links, through the words of those in the intellectual traditions out of which the Constitution emerges, the worlds of religious belief and secular constitutionalism. This is evidenced by Ackermann's place as a comparativist in the Court's own body of doctrine on law and religion.¹²³

There was a further comparative element to this career choice. As Ackermann explains:

[T]he person who made the single biggest impact on me was in fact Professor Louis Henkin of Columbia University, whom I met in 1983. He was one of the truest and most open-minded people I ever met in my life, and a world authority on human rights and a human rights activist in the United States. And I think his very clear way of thinking probably played the biggest role in my total rejection of *apartheid*. So much so that in 1986 I felt that it was not much good having a Westminster type Constitution where Parliament was sovereign. I felt that there was very little the judges could still do to ameliorate the impact of *apartheid*, and I was consequently instrumental in founding the Human Rights Chair at Stellenbosch. It really came as quite a surprise to me when both the donor and the university approached me to become the first professor. I eventually decided to accept the offer. The State President (PW Botha at the time) wouldn't give me permission to retire from the bench, so I had to resign, which involved the loss of my pension.¹²⁴

121 As above, 222.

122 Ackermann (n 93 above) 18.

123 C Rautenbach 'The South African Constitutional Court's use of foreign precedent in matters of religion: Without fear or favour?' (2015) 18(5) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 1545-1570.

124 University of the Witwatersrand (n 102 above).

3 The substantive legal rEvolution

Justice Ackermann was at the centre of the substantive legal revolution that resulted from the change from *apartheid* to constitutional democracy. His former colleague Kate O'Regan has argued that Ackermann's principled exploration of the values of dignity, freedom, and equality is 'an exercise in a form of judicial decision-making that marks a radical break from the traditional forms of legal reasoning in our legal system; and it is a form of reasoning entirely appropriate to our new constitutional order.'¹²⁵ Ackermann himself consistently describes the Constitution as a substantive but not a procedural revolution.¹²⁶ He has thus identified a paradoxical framing between the revolutionary and the evolutionary nature of the Constitution.

Ackermann's question was whether a constitutional revolution was not a contradiction in terms. His answer was that the South African transition from *apartheid* to post-*apartheid* was indeed a constitutional revolution that was not contradictory.¹²⁷ More particularly, Ackermann argued that 'the constitutional changes described constitute, in substance, a constitutional revolution, in the sense that the previous constitutional disposition was turned on its head, and that the content of the new constitutional dispensation differed radically from the previous one.'¹²⁸

As a good legal philosopher, Ackermann did not leave the matter resting upon only this clever framing – revolution as turning on its head, and the procedure / substance distinction.¹²⁹ Instead, he proceeded to face the substantive question: What did it mean to have a legal revolution? Ackermann's answer is revealing – both of his philosophy and of South Africa's current post-Ackermann constitutional moment (a matter largely beyond the scope of this chapter).

In a passage worth quoting at some length, Ackermann links a set of legal facts regarding the transition to democracy to the philosophy of the legal positivist Hans Kelsen. Ackermann writes:

Yet this radical constitutional change would not, in my view, qualify as a revolution procedurally. In his work, *General Theory of Law and State*, Hans Kelsen formulates a definition of a coup d'état or revolution that has gained wide recognition. The crux of the definition is that a revolution takes place 'whenever the legal order of a community is nullified and replaced by a new

125 K O'Regan 'From form to substance: The constitutional jurisprudence of Laurie Ackermann' in AJ Barnard-Naude *et al* *Dignity, Freedom and the post-apartheid legal order: The critical jurisprudence of Laurie Ackermann* (2008) 16.

126 Ackermann (n 114 above).

127 As above, 633-646.

128 As above, 646.

129 A Cockrell 'The South African Bill of Rights and the duck / rabbit' (1997) 60 *Modern Law Review* 513-537.

order in an illegitimate way, that is in a way not prescribed by the first legal order itself', or 'the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated.' That did not occur in South Africa. There was no discontinuous legal fracture with the old legal order. The revolution was commenced by a parliamentary statute of that old order (namely, the Interim Constitution) and controlled by it, and the Constitutional Court was created by it.¹³⁰

One sense in which Ackermann understands a procedural revolution is contained in the potential for a branch of the government to unilaterally change the procedures of the Constitution. This would be a violation of the separation of powers doctrine and not a good thing, as he makes clear in a post-constitutional context:

If an executive resolutely refuses [to comply with a court order] under all circumstances and no matter what opportunity had been given to him, no matter how reasonable and structured the interdict may be, refuses to do so, you've got to have a stage for revolution. When one branch of [government] refuses to honour its constitution ... what else is that but a procedural revolution? And the Courts have the immensely difficult task of deciding when it would be appropriate to teach the Executive a lesson by calling for the Minister involved or the Director-General involved ... and bring him to Court and say I'll give you a month's opportunity to explain why you haven't carried it out. And if there's not a reasonable explanation for why you can't do it, I'm going to commit you to jail for contempt of court.¹³¹

Significantly, Ackermann gives a prominent role, in the transition, to the Constitutional Principles. Many indeed saw these Principles as very significant at the time of transition. Yet they have faded both in substantive significance for the ongoing constitutional project (where the Bill of Rights has largely supplanted any force the Principles had) and also in the recollections of the transition. But ever the careful lawyer, Ackermann does not forget them. He points to their procedural and evolutionary nature. He does this by referring to them as the second of three components that secured the transition – a two-staged constitutional drafting and promulgating process, the Principles, and an arbiter (the Constitutional Court). The Principles are given further significance, in Ackermann's analysis, by the Court's role in deciding on their meaning and application to the result of the first stage of the constitution-making process.¹³²

In his insistence on the lack of a procedural revolution and his focus on the substantive nature of the transitional change, Ackermann distinguishes himself sharply from the superficially similar but actually

130 Ackermann (n 114 above) 646.

131 Bohler-Muller & Pienaar (n 120 above).

132 H Klug 'Towards a sociology of constitutional transformation: Understanding South Africa's post-apartheid constitutional order' (8 February 2016) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2729460 (accessed 20 November 2017); H Klug *Constituting democracy: Law, globalism and South Africa's political reconstruction* (2000).

quite different vision of the American critical legal studies scholar Karl Klare. Ackermann is the polar opposite to the standard understanding of the Klare vision of transformative constitutionalism. For Ackermann to call the legal change at the end of *apartheid* a substantive revolution is to characterise it as something less than a procedural revolution. For him,

[O]f course, when we started, this was part of what I'd call a substantive legal revolution. It wasn't in Kelsen's terms a formal one because there was no revolution, which made a total break with the structure. We had the *apartheid* Parliament, which passed the Interim Constitution, set up the negotiating structures, which negotiated and formulated the final Constitution. So while there was very peaceful and a legal handover of power substantively, the whole structure of the state and state organs were turned upside down.¹³³

In Ackermann's view, the substantive legal revolution of the transition was nonetheless a step short of revolution in the sense of a 'total break with the structure.'

4 The comparative rEvolution

Ackermann's third revolution was one of adjudicative approach. He was unabashed in his use of and appreciation for comparative law. Recall his appreciation for an American human rights and constitutional law professor, Louis Henkin – the single most influential person in Ackermann's jurisprudential development.

Ackermann's appreciation for comparative law was demonstrated early on in the evolution of constitutional jurisprudence in one of the first signs of a genuine difference of opinion within the Braamfontein Court. In *Fose*, O'Regan J and Kriegler J each gently but firmly distanced themselves from Ackermann's use of comparative law.¹³⁴ As academic commentators have remarked, Ackermann probably had the greatest faith in the use of comparative law and was willing to risk the danger of misinterpretation.¹³⁵ The counterpoint is provided by Justice Kriegler who, in discussing the risks of attempting to understand cases written in German, stated:

It's not an easy language, and it's certainly not technically an easy language. And there are writing styles, techniques, [and] mannerisms in legal writing in German, quite apart from always putting the verb in the wrong place. And people blindly concurred with Laurie's [Ackermann's] judgments. I couldn't do that; if I can't get to the guts of what it's about, if I don't understand what they are really saying, what is built on that, I can't go along with it.¹³⁶

133 University of the Witwatersrand (n 102 above).

134 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (5 June 1997).

135 U Bentele 'Mining for gold: The Constitutional Court of South Africa's experience with comparative constitutional law' (2009) 37 *Georgia Journal of International & Comparative Law* 242.

136 As above, 243.

On the whole, the use of German precedents in the Constitutional Court was significant, but must be seen within the context of the Court's extensive use of foreign precedents in general and a long South African tradition of knowledge of German legal scholarship, albeit mostly in private law.¹³⁷

The two touchstones of Ackermann's use of comparative law are legitimacy and the rule of law – perhaps best expressed as a commitment to the application of neutral principles. They came together when he was discussing whether the 'Chaskalson court' he was part of should be described as cautious:

I think we were cautious in the sense of being modest about working with the most sophisticated Constitution in the world and we had no previous experience with doing that. My attempt to overcome this was to look at comparative jurisprudence, because I was aware if you look at the first Constitutional Court and its composition it was heavily white. If you give a controversial judgement the legitimacy is so much greater if you can say these are the themes which have been agreed upon by other longstanding courts of democracy.¹³⁸

Ackermann's passion for comparative law may have led him into his institutional role in supporting the library of the Constitutional Court. As he puts it:

Obviously if one is going to adopt a comparative approach to constitutional law, this has great implications for the building up of the library as a research facility. And there are book lovers and book collectors who collect not just for the love of it, but because they have the feeling that if a book is referred to fruitfully once in its lifetime in a library, its purchase is justified. So it's very difficult to know where to draw the line, but it has become, I believe, a centre of research for a number of institutions. And I think the holdings, particularly the German holdings, are magnificent. One of my previous German clerks who has a good knowledge of our Constitutional Court library, said that it was really good enough for a German student to write his or her first German doctorate, which I took to be a great compliment.¹³⁹

Ackermann's penchant for the comparative method was in full view in his writings on dignity and equality. One may argue that his exercise of comparative law has guided his understanding of dignity in a fundamental manner. Ackermann himself argues that there is a disjuncture between his understanding of dignity while on the Court Bench and in his writings afterwards. As he puts it: '[I]n my book in a footnote I plead guilty to not [having] understood [at] the time when I wrote my judgements ... the

137 C Rautenbach & L du Plessis 'In the name of comparative constitutional jurisprudence: The consideration of German precedents by South African Constitutional Court judges' (2013) 14 *German Law Journal* 1539.

138 Bohler-Muller & Pienaar (n 120 above).

139 University of the Witwatersrand (n 102 above).

understanding of dignity and its all-encompassing [reference] that I have today.¹⁴⁰ Ackermann goes on to recognize that this was largely so in one respect: ‘particularly the fundamental question, [equality] of what?’¹⁴¹ This self-aware observation clearly places Ackermann as the herald of those calling for substantive equality. For him, the substance could be identified in large part through comparative law.

For Ackermann, dignity was not only in its essence but also in its praxis – part and parcel of the rule of law understood in a transnational sense. This is seen in his linkage of neutral principles to the adjudication of equality and dignity. As he has written: ‘May I suggest that dignity, and its relationship to equality, is one of these common values and that it is an indispensable constituent in neutrally principled and correct adjudication on issues of unfair discrimination.’¹⁴² As Theunis Roux has argued, there is a direct connection between Ackermann’s interest in human dignity and his commitment to comparative constitutional law. The purpose of comparative constitutional law was to discover the core content of domestic human rights regimes by ‘stripping away the superficial differences to get at the common essence beneath.’¹⁴³

The conceptual architecture in the Court’s use of dignity has been well described by Susannah Cowen.¹⁴⁴ As early as 2001, she asked the pertinent question whether the Court’s dignity jurisprudence could guide its search for equality. Her answer perhaps lies more towards the centre than Ackermann’s, yet it overlaps with his argument and does so in an eminently defensible space. She defends the use of dignity as a contested value, admitting the legal realist point that it is not determinate, but holding to the notion that it is a conceptual platform for justification and one shared by most South Africans. Conceived in this manner as a platform for justification, the concept of dignity fits well with Ackermann’s appetite for the use of comparative law. Cowen appropriately marks Ackermann and Chaskalson as the Justices most identified with the initial exposition of the concept of human dignity, while Justice Yvonne Mokgoro subsequently developed and elaborated the concept within the Court’s jurisprudence.

The relevance of the comparative law method to Ackermann’s continuing movement towards substantive questions even after his service on the Court Bench is revealed in an interchange with an interviewer.

140 Bohler-Muller & Pienaar (n 120 above).

141 As above.

142 L Ackermann, ‘Bram Fischer lecture: Equality and the South African Constitution: The role of dignity’ http://www.zaerv.de/60_2000/60_2000_1_a_537_556.pdf (accessed 20 November 2017).

143 T Roux ‘The dignity of comparative constitutional law’ in AJ Barnard-Naude *et al* *Dignity, freedom and the post-apartheid legal order: The critical jurisprudence of Laurie Ackermann* (2008) 202.

144 S Cowen ‘Can “dignity” guide South Africa’s equality jurisprudence?’ (2001) 17(1) *South African Journal on Human Rights* 34-58.

Interviewer: You've referred in your book ... [to the proposition] that dignity is a super-constitutional value. So it's not something that our Constitution creates, but rather that it's something that it recognises.

Ackermann: Ja. That would appear from the wording of Section 10. ... What is the thing that we are concerned with to protect by the Law? What is it?¹⁴⁵

5 Conclusion

This chapter has identified and discussed three distinct revolutions in Ackermann's constitutionalist thought: first, the revolution of human rights (with attention to some aspects of the South African legal order shown by Ackermann's career – its emphasis on legal expertise, its relative inclusivism, and its basis in values); second, that of the substantive character of the South African transition; and third, that of Ackermann's comparative constitutionalist adjudicative approach. These thematic revolutions of course overlap: they are identified in and drawn from Ackermann's own words; but they overlap with the themes in the words of other judges and other interpreters of the Constitution.

These overlaps – of meaning and of interlocutors – pose challenges to the concept of revolution. As one might expect from a judge-scholar, the revolutions he has been part of are ones that depend more on concepts and texts than on guns and barricades. As such, one might question whether revolutionary terminology is apt. The meaning of revolution for Ackermann appears, however, to be that there is no revolutionary moment that may be captured within a single act of expression. For him, every use of the term 'revolution' in the key text on the point is either prefaced by the adjective 'constitutional' or occurs within a sentence that points to the Constitutional Court or the other legal institutions surrounding the transition process.¹⁴⁶ For Ackermann, a text without an interpreter or interpreting institution is not revolutionary. Ackermann thus distances himself from accepting an act of expression alone as revolutionary. Yet this distancing fits with his deep reverence for the texts of the interim and the final Constitutions. He is left at the end with continuing substantive content questions rather than ones he sees as being of politics and institutional conflict, of revolutions and regime changes.

As this chapter has shown, Ackermann's movement through the legal system and the world of human rights has been more deliberative than expressive. His trajectory has been a journey. Cornell invokes similar imagery when she casts the ongoing 'journey' over dignity jurisprudence as '[a]rchitectonic'.¹⁴⁷ Her words acknowledge Ackermann's 'bravery'

145 Bohler-Muller & Pienaar (n 120 above).

146 Ackermann (n 114 above).

147 Cornell (n 112 above) 18.

and seem to characterise it as at once both a work of careful creativity and a process that summons the dreadful power of immense shifts in the foundations of the historical present. It is a testament to Ackermann's knowledge, imagination, skill, determination, and art that his words have occupied and still occupy a central place in the debates among judicial interpreters of the Constitution over the meaning, significance and evolving implications of equality and dignity in the law and practice of post-*apartheid* South Africa.

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