

Judge Ackermann and the Jurisprudence of Mourning

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When the great Israel Baal Shem Tov saw misfortune threatening the Jews, it was his custom to go into a certain part of the forest to meditate. There he would light a fire, say a special prayer, and the miracle would be accomplished and the misfortune averted.

Later when his disciple, the celebrated Maggid of Mezeritch, had occasion, for the same reason, to intercede with heaven, he would go to the same place in the forest and say: “Master of the Universe, listen! I do not know how to light the fire, but I am still able to say the prayer.” And again the miracle would be accomplished.

Still later, Moshe-Leib of Sassov, in order to save his people once more, would go into the forest and say: “I do not know the prayer, but I know the place and this must be sufficient.” It was sufficient and the miracle was accomplished.

Then it fell to Israel of Rizhin to overcome misfortune. Sitting in his armchair, his head in his hands, he spoke to God: “I am unable to light the fire and I do not know the prayer; I cannot even find the place in the forest. All I can do is tell the story, and this must be sufficient.” And it was sufficient.

*It no longer is. The proof is that the threat has not been averted. Perhaps we are no longer able to tell the story. Could all of us be guilty? Even the survivors? Especially the survivors?*¹

I INTRODUCTION

Gillian Rose uses the above midrash – which is derived from the work of Martin Buber and Elie Wiesel – to address the challenges confronting survivors. Rose contends that survivors would be guilty if they remained ‘self-defined *solely* as survivors; guilty’ because they would be fixed in ‘a counter-identification’:²

To survive – to live again – demands a new tale: a new prayer to be found, a new polity to be founded. It demands a willingness to participate in power and its legitimate violence for the sake of the good.³

I wish to employ this use of midrash by Rose to interrogate the concept of transformation of the South African legal system and the

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¹ G Rose *Mourning Becomes the Law* (1996) at 99–100.

² *Ibid* at 100.

³ *Ibid*.

manner in which the concept has been implemented in the early jurisprudence of the Constitutional Court. It is in these early developments of constitutional jurisprudence that Judge Ackermann played a critical role.

This paper focuses on the manner, in which the Constitutional Court, in its early jurisprudence, set the foundations for the 'transformative' development of South African private law. The body of private law which was inherited from apartheid eschewed any recourse to the concepts adopted in public law. Private lawyers were generally concerned with purity of concept rather than an interrogation of the power relationships which were reflected, reinforced and reproduced through those arrangements underpinned by private law. The Constitution⁴ promised an end to this insulation of private arrangements sanctioned by law from judicial scrutiny.⁵ These developments posed the possibility of a public meaning for private law; hence, how did the Court answer this question? Before engaging in this investigation, it is necessary to refer, albeit briefly, to the conceptual framework of adjudication which was inherited by the post-apartheid judiciary when constitutional democracy dawned in 1994.

The conventional narrative about the South African judiciary was that a liberal bench dominated South African jurisprudence until the mid 1950's. It was then replaced by a pro-executive judiciary which deferred with great jurisprudential gusto to the policies developed by the National Party after its 1948 electoral victory. Of course, the earlier 'liberal' tradition was not entirely obliterated. It lived on in the judgments of a small group of exceptionally courageous and principled judges. But the hegemony was enjoyed by the executive-minded, so carefully appointed by the government.

Expressed in its most elegant form, this clash of approaches to adjudication was constituted between common-law judges who sought to preserve the liberal values which justified the nature of the common law and plain-fact judges who gave as wide a latitude to the output of Parliament as was legally possible.⁶ For this latter group of judges, it was the law as it exists in fact which was determinative of their task to apply the law. The ultimate source of law-as-fact was Parliament. By contrast, those judges, who throughout the apartheid era strove to protect civil liberties and the rule of law against an arbitrary and capricious legal system introduced by the National Party, viewed law as not merely a

⁴ Constitution of the Republic of South Africa, 1996.

⁵ In particular see ss 8 and 39(2) of the Constitution .

⁶ The most penetrating scholarship in this field is by D Dyzenhaus *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (1991). See also D Dyzenhaus 'The disappearance of law' (1990)107 SALJ 227.

statutory scheme. Common-law values remained the bedrock of the legal system, in that these values were the core of the legal system. The judicial role was not simply a formalistic application of legal materials but, wherever possible, entailed the substantive integration of common law values into all legal materials.

So much for the conventional story. A further look at these models of adjudication in South Africa reveals that the common-law approach to adjudication as it developed in South Africa was derived primarily from the early jurisprudence of Judges Rose-Innes, Solomon, Centlivres and Schreiner. Arguably, these judges were libertarian by nature, in that they eschewed state interference in the lives of individual citizens. Their political worldview was based upon the night-watchman state which guaranteed civil liberties and the freedom of each individual to act as an autonomous being. Within this context, individuals were to be allowed to develop their own politics with the least possible interference from the state.⁷

By contrast, those judges whose approach to adjudication achieved hegemony during the early 1960's, when Lucas Steyn became the Chief Justice, found no difficulty with the model of law as an instrument for social engineering, particularly when that law was a product of Parliament which was seen as the central political institution to which judges invariably had to defer.

In 1994, South Africa commenced its constitutional journey. Neither the libertarian nor the social engineering model was entirely appropriate to the challenges of the text of the Constitution which was to govern South Africa after 1994. The constitutional text which was now to be given content was, in essence, a social democratic document. It imposed a range of obligations upon the state. Its aim may be described as the construction of a multi-cultural social democracy in South Africa. This is evident from the following seven provisions of the text of the Constitution:

- (1) Section 9 of the Constitution supports the conception of substantive equality in which the material conditions of citizens must be assessed in the promotion of the equality guarantee. In addition, s 9(3) contains a powerful anti-discrimination clause, which protects citizens not only against discrimination on the grounds of race and gender but also on the grounds of sexual orientation, age, belief, opinion and, arguably, class.
- (2) Section 8 provides for the horizontal application of the Bill of Rights. In short, a horizontal application of the Bill of Rights means

⁷ Of course, all of this took place within a discourse saturated by race from which none of these judges was entirely immune.

that all power, whether sourced in the state or private organisations, is subject to interrogation in terms of the provisions of the Bill of Rights whenever this power is exercised in the public domain.

- (3) Section 23 protects a range of labour rights, including the right to strike and the right to organise collectively and to form trade unions.
- (4) The Constitution contains a range of socio-economic rights, particularly in s 26, the right to housing, and s 27, the right to health. However interpreted, these clauses impose an obligation upon the state to ensure that no socio-economic programme be introduced without taking account of the priorities of the poorest of the poor within society.
- (5) Section 31 contains a guarantee of cultural rights and seeks to ensure that cultural identity is protected.
- (6) The foundational values of the text represent an amalgam of equality, dignity and freedom. Taken together, these values are different from the meaning of the parts. They need to be harmonised into a coherent normative framework. It will thus be argued, for example, that it is not possible to contend that the text promotes an exclusively negative conception of freedom of the kind developed most famously by Isaiah Berlin.⁸ If the values of equality, dignity and freedom are taken together in order to construct a coherent meaning for the foundation upon which the text is based, an egalitarian vision of South African society emerges where neither freedom without recognition of equality and dignity, nor, conversely, equality which crowds out freedom and individual dignity, can be sustained.
- (7) Section 36 contains a limitation clause. This ensures that none of the rights in the Constitution must invariably trump the policy of the democratically elected government. However, if any policy limits a constitutionally entrenched right, the government has to show adequate justification for the limitation. By ensuring that a culture of justification rather than a juristocracy prevails, a balance between constitutionalism and majoritarian democracy may be achieved. In other words, the Constitution demands of judges that they examine the justification for policy rather than seek to impose their own policies, which would tilt the balance of power in favour of the judiciary – an outcome which erodes democratic rule and invariably, the legitimacy of the constitutional enterprise.

⁸ I Berlin 'Two concepts of liberty' in I Berlin *Four Essays on Liberty* (1969) at 118–72.

II THE FIRST INDICATIONS

In the very first judgment delivered by the Constitutional Court, *S v Zuma*,⁹ the Constitutional Court was confronted with a challenge to a provision in legislation which placed the onus of proof on the accused in contra-distinction to the common-law presumption of innocence. Section 25(3)(c) of the interim Constitution¹⁰ provided that: 'Every accused person shall have the right to a fair trial which shall include the right . . . to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial'.

Significantly, Kentridge AJ, who delivered the judgment of a unanimous Court, said of these provisions:

The concepts embodied in these provisions are by no means an entirely new departure in South African criminal procedure. The presumption of innocence, the right of silence and the proscription of compelled confessions have for 150 years or more been recognised as basic principles of our law, although all of them have to a greater or lesser degree been eroded by statute and in some cases by judicial decision. The resulting body of common law and statute law forms part of the background to s 25.¹¹

Later in his judgement, Kentridge AJ reinforced the point:

But even if the common law rule governing the admissibility of confessions is a rule of evidence, it is, as I shall show, a rule which lies at the heart of the important rights embodied in s 25. . . .¹²

This early approach to the Constitution was significant. It was indicative of a view that the Constitution promised the restoration of South African law to the pristine position of the common law which could now be disentangled from the web of arbitrary and unfettered state control which had characterised apartheid legislation. It was almost as if the Constitution was not entirely necessary. Recourse to the common law could promote the values of freedom inherent in a body of law that was sourced in centuries of legal development. If *Zuma* gave a hint, more was to come which afforded greater clues as to a reading of the common law based on mourning.

⁹ 1995 (2) SA 642 (CC).

¹⁰ Constitution of the Republic of South Africa Act 200 of 1993.

¹¹ *S v Zuma* (n 9) 650 para 12.

¹² *Ibid* at 658 para 29.

III TOWARDS A LIBERTARIAN INTERPRETATION OF THE CONSTITUTION

In *Ferreira*,¹³ Ackermann J gave the right to freedom and security of the person a broad meaning so that this provision could amount to a residual protection of negative liberty. As he wrote:

The implication of this separate enumeration and independent protection of specific freedom rights is of course that the freedom rights protected by s 11(1) should more properly be designated “residual freedom rights”. Consequently, when it is alleged that any freedom right has been infringed, the proper methodology would be first to determine whether the right infringed is a specifically enumerated freedom right . . . If the alleged infringement is not of an enumerated freedom right, then the enquiry will be directed to determining whether a residual freedom right protected by s 11(1) has been infringed.¹⁴

Later in his judgment, Judge Ackermann provided examples of where this residual right would be effective:

One can think offhand of many prohibitions (such as an unqualified prohibition against a possession of any firearm, the possession of liquor in any form, the playing of sport on a Sunday, and a proscription of various activities or where or when they may be carried out) which might be difficult to challenge under the provisions of chapter 3 other than the s 11(1) residual freedom rights, but would be unacceptable in an “open and democratic society based on freedom and equality”.¹⁵

Any possible doubt about Judge Ackermann’s idea of freedom is dispelled by the fact that the judgment is dotted with references to the concept of negative liberty developed by Isaiah Berlin. Judge Ackermann cites Berlin’s negative concept of liberty as being involved

in the answer to the question, “What is the area within which the subject – a person or a group of persons – is or should be left to do or be what he is able to do or be, without interference by other persons?”¹⁶

Agreed, Judge Ackermann does proceed to emphasise that,

a broad and generous interpretation of freedom does not deny or preclude the constitutionally valid, and indeed essential, role of state intervention in the economic as well as the civil and political spheres. On the contrary, State

¹³ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC).

¹⁴ *Ibid* at 1019–20 para 57.

¹⁵ *Ibid* at 1023–24 para 67.

¹⁶ *Ibid* at 1016 para 52.

intervention is essential to resolve the paradox of unlimited freedom (where freedom ultimately destroys itself) in *all* these spheres.¹⁷

Further, he explains the idea of state intervention by reference to the work of Karl Popper.¹⁸ Popper recognised the need to develop a social democratic model to curb the unbridled excesses of economic power. Judge Ackermann was aware of this problem, as can be seen in his careful attempt to qualify the acceptance of negative liberty as so enthusiastically applied in *Lochner v New York*,¹⁹ which approach, he contended, had no place within South Africa.

A reader examining this series of qualifications is however justified in asking why the residual right existing within the Constitution should be that of negative freedom, particularly in a society where the imperative towards equality was so clearly historically mandated.

The other members of the Court were not prepared to give the broad, residual meaning to s 11 offered by Judge Ackermann. The president of the Court, Judge Chaskalson, said:

It would in my view be highly anomalous to give to unenumerated rights forming a “residue” in s 11(1) a higher status, subject to closer scrutiny, than a right so important to freedom as privacy, which is subject only to the “reasonable” test.²⁰

Judge Chaskalson did not find textual support for the conclusion reached by Judge Ackermann. Indeed, in clear reference to the minority judgment, Judge Chaskalson warned the Court to avoid the pitfall of *Lochner v New York*:

We should not however construe s 11 so broadly that we overshoot the mark and trespass upon terrain that is not rightly ours.²¹

Whatever the enthusiasm of Judge Ackermann for the concept of negative liberty as an unenumerated right, and however strong his conviction that it could be compatible with the forms of state intervention envisaged in the Constitution, the other judges on the Constitutional Court appeared to have serious doubts about this enterprise. Significantly, the majority of the Court found that there was no need to use s 11 to find that the impugned legislative provision was unconstitutional. A complete answer could be found in the right to a fair trial guaranteed by s 25(3), without the need to interrogate the s 11 right to freedom.

¹⁷ *Ibid* at 1017 para 52 (emphasis in the original).

¹⁸ K Popper *The Open Society and its Enemies* Vol 2 (1962) 124–25.

¹⁹ 198 US 45 (1905).

²⁰ *Ferreira v Levin NO* (n 13) at 1086–87 para 174.

²¹ *Ibid* at 1090 para 183.

Notwithstanding references to the role of the state as enshrined in the Constitution, the approach of Judge Ackermann to negative liberty displayed an absence of an analysis of power, save for a footnote reference to Karl Popper which was never developed in the judgment. The absence of power from his legal analyses and its effect upon legal development became more evident in the next case to be examined.

IV *DU PLESSIS v DE KLERK*:²² THE HORIZONTALITY DEBATE

Du Plessis v De Klerk afforded the Court an opportunity to examine a comprehensive argument concerning the application of the Constitution to private law. A newspaper had published a series of articles in which De Klerk was alleged to have used private aircraft to provide illegal assistance to UNITA during the Angolan war. He sued for defamation. The newspaper raised a series of defences. It denied that the articles had meant that De Klerk was involved in illegal activity, or that the articles were defamatory of him. In the alternative, they contended that the subject matter was of public interest. After the interim Constitution became law on 7 October 1994, the newspaper applied to amend its plea to allege that the publication of the articles had not been unlawful by reason of the protection afforded in terms of s 15 of the interim Constitution, containing the right to freedom of speech and expression which included the freedom of the press and other media. This necessitated an examination of whether the Bill of Rights applied to a dispute between two private parties. The Court conceded that this issue of horizontal application of the Bill of Rights had been hotly debated in South African legal literature.²³ The case could thus determine a critical question.

The majority judgement was written by Kentridge AJ. After a careful and exhaustive analysis of the academic literature and comparative law he concluded:

Chapter 3 [The Bill of Rights] does not have a general direct horizontal application, but it may and should have an influence on the development of the common law as it governs relations between individuals.²⁴

Ackermann J concurred with this finding. He found support for his judgment in particular in German jurisprudence for the conclusion that:

²² 1996 (3) SA 850 (CC).

²³ At the time, see A Cockrell 'Horizontal application of the interim Bill of Rights', unpublished paper UCT, 1995; J De Waal 'A comparative analysis of the provisions of German origin in the Bill of Rights' (1995) 11 *SAJHR* 1; A Cachalia et al *Fundamental Rights in the New Constitution* (1994) at 19ff; S Woolman 'Application' in M Chaskalson et al *Constitutional Law of South Africa* (1996) paras 10–11.

²⁴ *Du Plessis v De Klerk* (n 22) 887 para 62.

The framers of our Constitution did not intend that the chapter 3 fundamental rights should, save where the formulation of a particular right expressly or by necessary implication otherwise indicates, apply directly to legal relations between private persons.²⁵

Judge Ackermann conceded that s 35(3) of the interim Constitution, which provided for an indirect ‘radiating’ effect of the Bill of Rights on the development of the pre-constitutional common law and statute law, would ensure that traditional concepts such as public policy, *boni mores*, unlawfulness, reasonableness and fairness would continue to influence the common law. He concluded:

The common law of this country has, in the past, proved to be flexible and adaptable, and I am confident that it can also meet this new constitutional mandate.²⁶

Judge Ackermann then went on to sketch, albeit briefly, the jurisprudential assumptions which underpin this conclusion:

Direct application of the chapter 3 rights, quite apart from the undesirable consequences already mentioned will cast onto the Constitutional Court the formidable ultimate task of reforming the common law of this country, a consequence which could not have been intended by the drafters. It turns the Constitution, contrary to the historical evolution of constitutional individual rights protection, also into a code of obligations for private individuals, with no indication in the Constitution as to how clashes between rights and duties are to be resolved, or how clashing rights are to be “balanced”. . . . It would also be undesirable in the broader constitutional sense, pre-empting in many cases Parliament’s role of reforming common law by ordinary legislation.²⁷

The judgment refers to the flexibility and the adaptability of the common law. This echoes Judge Ackermann’s professor at law school, the legendary academic J C De Wet who, in 1948, had written an important article in which he argued against the codification of South African private law. The parallels in reasoning are illuminating. Professor De Wet argued that the codification of South African law would stultify its future development. He suggested that the major source of South African private law, Roman Law, had transcended civilisations and a myriad of historical developments. Its structure was universal and its concepts adaptable to the exigencies of any time. Concepts such as good faith, reasonableness and wrongfulness could be adapted to meet the needs of any generation in a manner far superior to a codification of the

²⁵ Ibid at 904 para 106.

²⁶ Ibid at 906 para 110.

²⁷ Ibid at 906 para 112.

law which was likely to ossify the law rather than facilitating its development.²⁸ In Ackermann's reasoning the Constitution now replaced a possible code, but the similarities of approach to the defence of the common law against being subsumed under an all encompassing text are clear.

Most of the judges followed this approach. There was, however, a significant minority judgment written by Judge Kriegler, who rejected the use of comparative law, particularly American constitutional law, to support the narrow conclusion of the majority. As he wrote:

We do not operate under a constitution in which the avowed purpose of the drafters was to place limitations on government control. Our Constitution aims at establishing freedom and equality in a grossly disparate society.²⁹

Judge Madala developed this approach even further. He stated:

Ours is a multi-racial, multi-cultural, multi-lingual society in which the ravages of apartheid disadvantage and inequality are just immeasurable. The extent of the oppressive measures in South Africa was not confined to government/individual relations, but equally to individual/individual relations. In its effort to create a new order, our Constitution must have been intended to address these oppressive undemocratic practices at all levels. In my view our Constitution starts at the lowest level and attempts to reach the furthest in its endeavours to restructure the dynamics in a previously racist society.³⁰

In contrast to the approaches adopted by Judges Kentridge and Ackermann, Judges Kriegler and Madala understood the context in which our Constitution was litigated and the influential manner in which private power helped shape apartheid society, the antidote to which were the provisions of the Constitution.

V CARMICHELE

The next major demand upon the Court to examine the common law through the prism of the Constitution arose in *Carmichele v Minister of Safety and Security*.³¹ Carmichele was brutally assaulted by a man who had previously been convicted and charged with housebreaking and indecent assault, for which he had been sentenced to a fine and a suspended period of imprisonment. At the time of the attack on Carmichele, he had already been charged with rape. Notwithstanding his previous criminal record, when he appeared in the magistrates' court on the rape charge, he was

²⁸ See JC De Wet 'Gemene reg of wetgewing' (1948) 11 *THRHR* 1.

²⁹ *Du Plessis v De Klerk* (n 22) 919 para 147.

³⁰ *Ibid* at 927 para 163.

³¹ 2001 (4) SA 938 (CC).

released by the magistrate on his own recognisances. In doing this, the magistrate followed the recommendation that the investigating police officer had made in the face of representations made to the police and the local prosecutor regarding the threat posed by the accused. He was obviously a dangerous person but nothing could persuade the authorities to keep him in custody pending his rape trial. After his release, he brutally assaulted Carmichele.³²

She sued both the Minister of Safety and Security and the Minister of Justice and Constitutional Development. She claimed that members of the police and the prosecution service had negligently failed to comply with their legal duty to take steps to prevent the assailant from causing harm.³³ The trial judge held that there was no evidence on which the court, on the basis of the existing law of delict (tort), could reasonably find that the prosecutor or police had acted wrongfully. He granted an order of absolution from the instance. This decision was confirmed by the Supreme Court of Appeal.³⁴

Carmichele then approached the Constitutional Court. Carmichele's argument was that, if they had developed the common law in terms of s 39(2) of the Constitution, both the High Court and the Supreme Court of Appeal would have found that there existed a legal duty upon the State to protect citizens from violent criminals, the breach of which grounded for a delictual action.

The task facing the Constitutional Court was to decide whether the common law of delict required development beyond existing precedent; this being a necessary condition for Carmichele to succeed. Judges Ackermann and Goldstone set out the foundation upon which their joint judgment was built as follows:

Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution an objective, normative value system. . . It is within the matrix of this objective normative value system that the common law must be developed.³⁵

The two judges noted that, not only must the common law be developed in a way which meets the objectives of s 39(2) of the Constitution, but this 'must also be done in a way most appropriate for the development of the common law within its own paradigm'.³⁶

The judges noted that concepts such as 'policy decisions' and 'value judgements', as well as society's notion of 'what justice demands', might

³² Ibid paras 5–24.

³³ Ibid para 25.

³⁴ Ibid paras 25–26.

³⁵ Ibid at 961 para 54.

³⁶ Ibid at 962 para 55.

have to be ‘replaced or supplemented and enriched by the appropriate norms of the objective value system embodied in the Constitution’.³⁷ After consideration of the alternatives in which the delictual concept of lawfulness could be developed in the light of the values embodied in the Constitution, Judges Ackermann and Goldstone concluded:

Our common law of delict spans many centuries and the debate regarding delictual liability, its elements and their relationship to one another, remains lively. Without the benefits of a fully considered judgment from either the SCA or the High Court as to whether, from the perspective of the common law, one solution would be better than any other, this Court is at a “grave disadvantage” . . .³⁸

The Constitutional Court thus refused to make a final decision. On the basis of the evidence presented, it concluded:

[T]he case for the appellant has sufficient merit to require careful consideration to be given to the complex legal issues that it raises. . . It is not desirable that a case as complex as this should be dealt with on the basis of what the facts might be rather than what they are.³⁹

Having concluded in principle that the negligence of a prosecutor resulting in the release of a violent accused who then proceeds to implement a threat can be a cause of a delictual action, the Court said: ‘A strong case could be made for holding the prosecutor liable for the damages suffered by the complainant.’⁴⁰

On one level, the judgment represented an important development in the law. The Court confirmed that the Constitution could not be ignored in an action based on a common-law cause of action, where existing precedent did not sustain such an action.

Notwithstanding this important conclusion, the judgment remains highly confusing. For much of its analysis, it appears to be working with the delictual concept of wrongfulness as the disputed element of delictual liability. It then suddenly turns to emphasise the consequences of a negligent failure by a prosecutor to act, adding to the confusion by the employment of the concept of a legal duty owed by a prosecutor either to the public generally or to a particular member thereof. This raises the question whether the Court was dealing with the requirement of negligence rather than wrongfulness.

In turn, this enquiry leads back to the Court’s analysis of the relationship between the so-called objective normative value-system of

³⁷ Ibid at 962 para 56.

³⁸ Ibid at 963 para 58.

³⁹ Ibid at 970–71 para 81.

⁴⁰ Ibid at 968 para 74.

the Constitution and the development of the common law. Not only is there no indication as to the content of this objective normative value system, but there is also a lack of analysis regarding the scope and meaning of the very constitutional section employed by the Court to link the Constitution with the common law, namely s 39(2) of the Constitution. For example, if the Court was dealing with wrongfulness, then a clear, coherent application of its observation about the role of the normative system would have been instructive. Wrongfulness could have been given content through the normative system. Not only did this not happen but the reason for this failure is unclear. Either the Court considered this to be a developmental bridge too far or it had shifted its attention to the requirement of negligence. Whatever the answer, little of our law of delict had changed save for the broadest of indications regarding its future direction, which was not much different from pre-constitutional methodology.

The wording of s 39(2) is important – ‘when interpreting any legislation and *when developing the common law*, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.’ The judgment in *Carmichele* gives no indication as to when this development is mandated nor as to the particular steps which are to be taken in achieving this development. The wording of this section does not impose a mandatory obligation to develop the common law in terms of the Constitution; rather it requires of the court, *when* it decides to develop the common law, that it must ‘promote the spirit purport and objects of the Bill of Rights’.

In any event, s 39(2) did not percolate into the Constitutional Court’s judgment. In summary, save for informing the legal community that the Constitution contains an objective, normative value system and that ‘our common law spans many centuries’, there was little in the judgment to indicate how the process of the development of the common law would now take place nor was there a scintilla of suggestion as to whether the manner in which the common law had been developed prior to the advent of constitutional democracy was different from that to be adopted by courts after 1994, save for the notion of supplementation by undefined norms.

The absence of any guidance as to the transformative potential of the Constitution or of the development of the common law has meant that, in a series of subsequent cases, particularly in the area of contract, the existing body of common law has been left almost immune from engagement with the foundational values of the Constitution. The essentially individualistic nature of the law of contract, bequeathed to South Africa by its pre-constitutional past, has continued to operate, long after the *Carmichele* decision. That case afforded an opportunity to

examine the foundations of the common law in order to guide the courts of South Africa beyond the individualistic premises upon which much private law had been predicated.⁴¹

Arguably the most significant implication to draw from *Carmichele* is the following: The common law has developed over centuries. It constitutes a repository of great wisdom. Its mysteries are best unravelled by specialists who reside in the Supreme Court of Appeal and High Courts. We, as the Constitutional Court, can but engage in gentle, generalised jurisprudential prodding.⁴²

VI THE GENERAL DIGNITY JURISPRUDENCE

So far this paper has considered judgments relating exclusively to private law. Without straying too far from this focus, it is important to reinforce the link between the individualism exhibited in the judgments examined, together with the absence of any examination of the concept of power, and the early dignity jurisprudence of the Court in which Judge Ackermann was a prominent author. This link can be established by a brief analysis of Ackermann J's important judgment in *National Coalition for Gay and Lesbian Equality v Minister of Justice*.⁴³

The matter came to the Constitutional Court by way of confirmation of a declaration of constitutional invalidity of legislation which included the crime of sodomy. The Constitutional Court was asked to confirm a declaration by the High Court that these common-law offences were inconsistent with the Constitution as were similar legislative provisions. In upholding the declaration of invalidity, Judge Ackermann took the opportunity again to assert the right to dignity as 'a cornerstone of our Constitution'.⁴⁴ The following passage from his judgment echoes *Ferreira*, in which individual freedom was asserted to be the cornerstone of the Constitution, and similarly the individualised right to dignity:

Dignity is a difficult concept to capture in precise terms. At its least, it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society. The

⁴¹ See *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA). See also L Hawthorne 'Distribution of wealth: The dependency theory and the law of contract' (2006) 69 *THRHR* 48. Later Constitutional Court cases have done very little to move the framework beyond that of *Carmichele*. See for example *Barkhuizen v Napier* 2007 (5) SA 323 (CC). The minority judgments of Moseneke DCJ and Sachs J do, however, illustrate the possibility of a different approach to the common law.

⁴² The advent of the Constitution and the express provisions of ss 8 and 39(2) notwithstanding, there is precious little difference between the approach adopted in *Carmichele* and that of *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) to the development of the common law of delict, even though *Ewels* was decided in the heart of the Apartheid darkness in 1975.

⁴³ 1999 (1) SA 6 (CC).

⁴⁴ *Ibid* at 28 para 28.

common-law prohibition on sodomy criminalises all sexual intercourse *per anum* between men regardless of the relationship of the couple who engage therein, or the age of such couple, or the place where it occurs, or indeed of any other circumstances whatsoever. . . . There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society.⁴⁵

Judge Ackermann went on to state that the breach of the right to dignity did not mean that the right to privacy had not also been breached. He confirmed that the right to privacy recognised the right ‘to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community’.⁴⁶

Judge Ackermann roundly rejected arguments to the effect that the Court’s equality jurisprudence did not give sufficient weight to principles of substantive equality and that it was predicated excessively on an individualistic concept of dignity. The dignitarian approach to equality had initially been adopted by the Court in *President of the Republic of South Africa and another v Hugo*.⁴⁷ Significantly, in *Hugo’s* case the Court stated:

At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional government and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.⁴⁸

If this phrase may have appeared to be ambiguous, the Court then clarified its meaning by the express approval of a *dictum* in *Egan v Canada*,⁴⁹ a decision of the Canadian Supreme Court:

This Court has recognised that inherent human dignity is at the heart of individual rights in a free and democratic society. . . . More than any other right in the Charter, s 15 [the equality right] gives effect to this notion. . . . Equality, as that concept is enshrined as a fundamental right within s 15 of the Charter, means nothing if it does not represent the commitment to recognising each person’s equal worth as a human being, regardless of individual differences.⁵⁰

To the extent that there might be any dispute about the individualistic content given to dignity as well as equality by Judge Ackermann, he clarified his position in an academic article written somewhat later:

⁴⁵ *Ibid* at 28–9 para 28.

⁴⁶ *Ibid* at 30 para 32.

⁴⁷ 1997 (4) SA 1 (CC).

⁴⁸ *Ibid* at 22–3 para 41.

⁴⁹ (1995) 29 CRR (2d) 79.

⁵⁰ Cited by Goldstone J in *Hugo* (n 47) at 23 para 41.

What lay at the heart of the apartheid pathology was the extensive and sustained attempt to deny to the majority of the South African population the right of self-identification and self-determination. That state did its best to deny to blacks that which is definitional to being human, namely the ability to understand or at least define oneself to choose one's own powers and to act freely as a moral agent pursuant to such understanding of self-definition. Blacks were treated as a means to an end hardly ever as an end, to themselves, an almost complete reversal of the Kantian imperative and concept of priceless inner worth and dignity.⁵¹

VII THE EFFECT OF THESE JUDGMENTS

The cases analysed in this paper support the view that Judge Ackermann's approach spawned a jurisprudence of individualism. At the heart of this constitutional enterprise is the autonomy of the individual. This approach is articulated best in Judge Ackermann's minority judgment in *Ferreira*, but also finds expression in the other judgments which have been the subject of analysis in this paper. In turn, it is this individualism which lies at the heart of the body of common law which was inherited from the South African past.

Any doubt there may have been that it is individualism upon which the body of common law is predicated, was removed in the eloquent judgment of Judge Edwin Cameron in *Brisley v Drotzky*.⁵² In dealing with the question whether contractual freedom can be limited by our law, particularly in the light of fundamental constitutional values, Judge Cameron held that, '[c]ontractual autonomy informs also the constitutional value of dignity'.⁵³ In support of this conclusion, Judge Cameron cites H L A Hart's *The Concept of Law*:

Rules conferring private powers must, if they are to be understood, be looked at from the point of view of those who exercise them. They appear then as an additional element introduced by the law into social life over and above that of coercive control. This is so because possession of these legal powers makes of the private citizen, who, if there were no such rules, would be a mere duty-bearer, a private legislator. He is made competent to determine the course of the law within the sphere of his contracts, trusts, wills and other structures of rights and duties which he is enabled to build.⁵⁴

This was the basic premise of the common law, prior to the encrustations of race which were added, mainly after 1948. A libertarian,

⁵¹ L W H Ackermann 'The legal nature of the South African constitutional revolution' (2004) 4 *New Zealand Law Journal* 650. For a comprehensive analysis of differing approaches to dignity, the complexity of which falls outside this paper, see S Woolman 'Dignity' in S Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (Original Service, 2006) Ch 36.

⁵² 2002 (4) SA 1 (SCA).

⁵³ *Ibid* at 35 para 94.

⁵⁴ *Ibid* at 35–6 para 94.

who viewed the common law in this fashion, would enthusiastically support a declaration of constitutional invalidity of any common-law or legislative rule that impeded the right of individual autonomy. Viewed in its best possible light, this appears to be the fundamental thrust of the jurisprudence of Judge Ackermann. I accept that in *Ferreira*, as well as in the *Gay and Lesbian* case, Judge Ackermann endorsed the need for social and economic change, but the express constitutional text made it difficult to avoid such an endorsement.⁵⁵ The point, however, is to probe his foundational approach and its link to the common law. The argument is that at root individualism was seen as the foundation of the constitutional enterprise, a result that is found when the examination bores down to the core of the approach. It is here that the jurisprudence of Judge Ackermann exhibits the element of mourning.

VIII MOURNING

In a number of works, Jacques Derrida considers two models of the type of encroachment between the self and the other that are regularly associated with mourning. Drawing upon the Freudian concept of mourning, Derrida draws a distinction between introjection, love for the other in me, and incorporation, retaining the other as a foreign body within my own body. For Freud and for the more contemporary psychologists Nicolas Abraham and Maria Torok, on whose work Derrida further draws for inspiration, successful mourning primarily concerns the introjection of the other. The preservation of the other as a discrete body inside the self, as in the case of incorporation is considered to be where mourning ceases to be a 'normal' and rather a pathological response.

As often in his works, Derrida reverses the hierarchy by emphasising that there is a sense in which the pathological condition of incorporation can be more respectful of the alterity of the other person. Incorporation, in effect, means that I have not totally assimilated the other. By contrast, Abraham and Torok's idea of 'normal mourning' can be seen to be interiorising the other person to such an extent that the one is assimilated or cannibalised into the other. Derrida nevertheless refuses to endorse unreservedly the incorporation of the other person as an adequate reflection of 'successful' mourning. He accepts that the more the self

⁵⁵ After all, even Adam Smith argued for the State to take an active role when he wrote that 'those exertions of the natural liberty of a few individuals, which may endanger the security of the whole society, are and ought to be, restrained by the laws of all governments'. A Smith *An Enquiry Into the Nature and Causes of the Wealth of Nations* (1937) at 353. Smith was not referring to national security but to the excessive power of banks and financial institutions.

'keeps the foreign element inside itself the more it excludes it'.⁵⁶ If we refuse to engage with the dead 'other', Derrida argues, we exclude their foreignness from ourselves and therefore prevent any transformative interaction with them. When fetishised in their externality, the dead 'other' is actually lifeless and can subvert the transformational opportunity. The crisp point made by Derrida is that, in that process of mourning, 'the otherness of the other' person resists both the process of incorporation and the process of introjection. Responsibility towards the 'other' is about respecting and even emphasizing this resistance.⁵⁷

Viewed within this context, the jurisprudence of Laurie Ackermann, as examined in this paper, involves a refusal to engage with the dead 'other', that is, with the common law, which was essential to the commercial, economic and social intercourse until 1994 when South Africa became a democracy. Consequently, his jurisprudence does not seek to exclude that body of law from the newly created body of law nor is there a serious interaction between common-law precedent and constitutional possibility which could give rise to a transformative interaction.

The Constitutional Court began the development of its jurisprudence in the case of *Zuma* by emphasising that, absent apartheid history and its effect on the South African legal system, much of the content of the Bill of Rights as contained in the Constitution would be unnecessary as it was already enshrined in the common law. The implication was that the Constitution's purpose was to purge the body of South African law of the apartheid cancer and, accordingly, to work pure the body of common law. The common law, particularly South African private law, was based centrally on individualistic core premises. For example, the common law of contract was predicated on the primary informing value of individual autonomy and hence recognition of the unfettered freedom of contract.⁵⁸

The concept of individual autonomy finds its constitutional proclamation in *Ferreira*, where Judge Ackermann saw the notion of negative liberty as the residual value within the South African Constitution. In *Hugo* and the cases that followed, the Court embarked upon the further development of an individualistic conception of dignity which became the foundational value in its early constitutional jurisprudence. Even when the Court was forced to engage constitutionally with the law of delict in the *Carmichele* case, it failed to provide any guidance as to how the objective normative framework of the Constitution, undeveloped as

⁵⁶ J Derrida 'Fors: the english words of Nicolas Abraham and Maria Torok' in N Abraham & M Torok *The Wolf Man's Magic Word: A Cryptonymy* (1986) at xvii.

⁵⁷ J Derrida *Memoirs for Paul De Man* (1989) 160.

⁵⁸ See M Hogg and G Lubbe 'Formation of contract' in R Zimmermann, D Visser and K Reid *Mixed Legal Systems in Comparative Perspective* (2004) at 36.

it might have been in that judgment, could assist in examining the extent to which the old body of common law could remain in the new body, being created out of the mandated constitutional framework.

The cases analysed in this paper are indicative of the prodigious, learned and meticulously-crafted judgments of Laurie Ackermann. Few judges in this country have been his equal in delivering a well-crafted, erudite judgment. But the jurisprudence offered by the Court appeared to work with a timeless quality of existing common law. There was little examination of the extent to which the Constitution demanded an engagement between the old and new in order to construct a new body, or, to employ the description of Gillian Rose, a new story. In significant areas of private law, as in the law of contract, the old story dominated, almost as if the Constitution never existed.

Further, the individualistic concept of dignity continues to hold significant sway in a broader context. For example, in *S v Jordan*,⁵⁹ Judges O'Regan and Sachs describe the significance of the decision in the *National Coalition v Minister of Justice* case thus:

The judgment accordingly emphasises the interaction between equality, dignity and privacy in relation to a community that has been discriminated against on the basis of closely-held personal characteristics. Furthermore, it stresses that the protective sphere of private intimacy and autonomy relates to establishing and nurturing human relationships.⁶⁰

IX CONCLUSION

As already noted, two dominant models of adjudication emerged out of apartheid – a libertarian one, suspicious of state power, and an uncritical acceptance of the law as an instrument of social engineering. In 1994, when South Africa began its constitutional journey, it commenced on the basis of a text which proclaimed the need to transform South African society into an egalitarian community. That demanded more than a recourse to libertarian autonomy or to an unfettered and unaccountable exercise of social engineering by the state. The point of this paper is that in mourning the glorious common law of the past, the opportunity was lost to develop a new story which could have given rise to an adjudicative framework in closer accordance with the constitutional vision. A new story still remains to be told, the admirable industry of Laurie Ackermann notwithstanding. Perhaps that story could be based on the alternative reading of the Constitution offered earlier in this paper.

Andre van der Walt has eloquently summarised the argument of this

⁵⁹ *S v Jordan* 2002 (6) SA 642 (CC).

⁶⁰ *Ibid* at 675 para 82.

paper, and hence the effect of telling the same story, with the following story of his own:⁶¹

A few weeks ago, a long-lost and forgotten painting was discovered during the restoration of the old Palace of Justice in Pretoria. The painting, executed in 1692 by seventeenth-century Dutch master Jan Weenix, shows Johannes Voet (1647 – 1713), dressed in lawyer's robes, sitting at his desk with a closed copy of *Corpus Iuris Civilis* at his elbow, and with an open book – possibly a part of his influential *Commentarius ad Pandectas* – on which he is working. The discovery of the painting was met with enthusiastic comments from prominent lawyers, who pointed out the symbolic value of this painting of Voet, whose works formed 'the backbone of our law' during the nineteenth century and the early part of this century. This enthusiasm about the symbolic value of this painting reminds one of the view, expressed by eminent lawyers such as the current Chief Justice, that the Roman-Dutch tradition was not fundamentally tainted by the decades of apartheid, and that it, like the old Palace of Justice and the painting of Voet, could and should be restored to its former glory and receive its due place of honour in the legal system of the new South Africa. The analysis above suggests, in my view, that we should perhaps not be quite so enthusiastic about the future of our tradition, and that we should resist rather than welcome its influence on the tradition of our future. The Department of Justice obviously thinks that the painting of Voet should receive a place of honour in the newly restored court complex, . . . once it has been restored.

I, for one, would like to see the painting go to an art museum. We should not have a painting of Voet on a wall of the Palace of Justice for the same reason that we should not have a stuffed parrot on the shelf in front of which we say our prayers.

⁶¹ AJ van der Walt 'Un-doing things with words: The colonisation of the public sphere by private property discourse' 1998 *Acta Juridica* 270 at 280–81.